TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~111~~ 204

HENRY B. MERRILL, DAVID G. FLOYD, CHARLES BATES, H. S. ACKLEY, C. WHITEHEAD, AND WILLIAM WHITEHEAD, LIBELANTS, APPELLANTS,

vs.

THE SCHOONER MARY EVELINE, &c., JOHN W. PETTY AND ISAAC HOMAN.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED DECEMBER 1, 1871.

SUPREME COURT OF THE UNITED STATES.

No. 441.

HENRY B. MERRILL, DAVID G. FLOYD, CHARLES BATES, H. S. ACKLEY, C. WHITEHEAD, AND WILLIAM WHITEHEAD, LIBELANTS, APPELLANTS,

vs.

THE SCHOONER MARY EVELINE, &c., JOHN W. PETTY AND ISAAC HOMAN.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

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a UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, Kenneth G. White, clerk of the circuit court of the United States of America for the southern district of New York, in the second [SEAL.] circuit, do hereby certify that the following pages, numbered from one to one hundred and forty-four, contain a true and complete transcript of the record and proceedings had in said court in the case of Henry B. Merrill & others, libellants & appellants, vs. The Schooner "Mary Eveline," her tackle, &c., John W. Petty and Isaac Homan, claimants and appellees, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this twenty-seventh day of November, in the year of our Lord one thousand eight hundred and seventy-one, and of the independence of the said United States the ninety-sixth.

KENNETH G. WHITE, *Clerk.*

[5-ct. int. rev. stamp, canceled.]

1 At a stated term of the district court of the United States of America for the southern district of New York, in the second circuit, held at the United States court-rooms, in the city of New York, on Wednesday, the 20th day of October, in the year of our Lord one thousand eight hundred and sixty-nine—present, the honorable Charles L. Benedict, dist. judge.

HENRY B. MERRILL & OTHERS
against
THE SCHOONER MARY EVELINE, HER TACKLE, &c. } Vol. 22, page 401.

1868, DEC. 23rd. The libellants file their libel against the above-named schooner, her tackle, apparel, &c., in the words and figures following, to wit:

To the honorable Samuel Blatchford, judge of the district court of the the United States for the southern district of New York:

The libel and complaint of Henry B. Merrill, David G. Floyd, and Charles Bates, for themselves, and of Henry S. Ackley, as executor of the last will and testament of Elisha S. Champion, deceased, owners of the sloop Ethan Allen, of Greenport, in the eastern district of New York, under the firm-name of C. & W. Whitehead, owners of 37½ tons of clay and 37½ tons of sand, lately laden on board said sloop Ethan Allen, against the schooner Mary Eveline, whereof Wesley Petty now is or lately was master, her tackle, apparel, and furniture, and against all persons lawfully intervening for their interest therein, in a cause
2 of collision, civil and maritime, alleges as follows:

First. That, during all the time hereinafter named, the libellants, Henry B. Merrill, David G. Floyd, Charles Bates, and Henry S. Ackley, as the executor of the last will and testament of Elisha S. Champion, deceased, were the owners of the sloop Ethan Allen; and the libellants, C. & W. Whitehead, were the owners of the cargo lately laden on board of said sloop, consisting of 37½ tons of clay and 37½ tons of sand, and that said clay and sand, while on board of said sloop, were totally lost by the collision hereinafter described, and said Henry S. Ackley is the

executor of the last will and testament of Elisha S. Champion, deceased.

3 Second. That at about 7½ o'clock on the morning of Sunday, September 20th, 1868, the said sloop Ethan Allen, of forty one tons burden, and having a crew of two men, besides the master who was the libellant, Henry B. Merrill, sailed from Wood's dock, on the Raritan River, in the State of New Jersey, bound for Middletown, in the State of Connecticut, with the aforesaid cargo of clay and sand on board; that, at about two o'clock in the afternoon of said last-named day, said sloop had arrived at the lower or southern extremity of Blackwell's Island, and was passing through the East River, on the east side of Blackwell's Island, against a strong ebb-tide with the wind about south-southwest, and blowing a whole-sale breeze; that, for the purpose of taking advantage of an eddy-tide, said sloop was standing along at the distance of from fifty to seventy-five feet from the Blackwell's Island shore, and at about half-past two in the afternoon had run a little more than half the length of that island, and was still standing along very near the shore with her boom on her port side, and was still in the eddy made by the tide in that locality; that while said sloop was so standing along on a steady course, at about the hour last named, two schooners were beating up the East River, towards New York City, on the same side of Blackwell's Island, and at the time last named were standing across the river to the westward; that the foremost and windward of said schooners

4 beat out her track, and went about just abreast of said sloop Ethan Allen, and at a safe and suitable distance from her; that the other of said schooners, which proved to be the Mary Eveline, stood along to the leeward of the other schooner, and continued so standing after that other schooner went about, and in such a position and direction as to entirely prevent the Ethan Allen luffing or in any other way avoiding her; that she continued her course till she arrived at a point ahead of and off the starboard bow of the Ethan Allen, when she put down her helm to go about, and, while in the act of luffing in the wind, she run into and upon the said sloop Ethan Allen, striking her at the cathead on her starboard bow, breaking and crushing in her planking, and causing her to sink in a very few minutes, with a total loss of said sloop and cargo and of the clothing, bedding, charts, spy-glass, and all the materials and implements for the management and navigation of said sloop; that said collision was done wholly by the negligence and carelessness of said schooner Mary Eveline, and was not caused by any act, fault, or omission of the said Ethan Allen.

Third. That said sloop Ethan Allen was, at the time she was sunk and lost as hereinbefore stated, worth the sum of $2,700; that she had earned as freight on her aforesaid cargo the sum of $100, and that the libellant, Henry B. Merrill, lost in charts, clothing, spy-glass, &c., the sum of $100, and that the cargo of clay and sand on board of said sloop, and which was totally lost, was worth the sum of $139.37.

Fourth. That, after the sinking of said sloop, the libellants,

5 who were the owners thereof, being aware that to permit her to remain where she was would be an obstruction and dangerous to navigation, and that she really was dangerous to vessels passing through that channel, and that the law required them to remove said obstruction, proceeded to and did remove said sloop at an expense of $1,000, and that, after she was so removed, she was sold at the best price that could be obtained, and brought the sum of $550, which was her then value, she being entirely worthless to repair, and that the entire damage to all these libellants, resulting from said collision, is $3,489.37.

Fifth. That all and singular the premises are true and within the admiralty and maritime jurisdiction of this honorable court, and that the said schooner Mary Eveline is, at the time of filing this libel, within the southern district of New York.

Wherefore, these libellants pray that process, in due form of law, may issue against the said schooner Mary Eveline, her tackle, apparel, and furniture; that this honorable court will pronounce for their aforesaid demand and will condemn said schooner, and decree that she be sold for the payment thereof, with costs, and for such other and further relief and redress as to right and justice may appertain, and as the court is competent to give in the premises.

HENRY B. MERRILL.

Sworn to before me this 5th day of November, 1868.

EDWARD L. OWENS,
U. S. Commissioner.

R. H. HUNTLY,
Proctor for Libellants.

6 (Endorsed:) 22. 401. U. S. district court, southern district of New York. Henry B. Merrill & others against The Schooner Mary Eveline, her tackle, &c. Libel. R. H. Huntly, proctor for libellants. Filed Dec. 23, 1868.

7 *Stipulation for libellant's costs. Entered into pursuant to the rules and practice of this court.—Filed the 23rd day of Dec.*, 1868.

District court of the United States for the southern district of New York.

Whereas a libel was filed in this court on the 23rd day of Dec., in the year of our Lord one thousand eight hundred and sixty-eight, by Henry B. Merrill & als. against The schooner Mary Eveline, her tackle, &c., for the reasons and causes in the said libel mentioned, and praying that said sch'r be condemned, &c., and the said libellants and Henry S. Rackett and Geo. R. Rackett, sureties, parties hereto, hereby consenting and agreeing that in case of default or contumacy on the part of the libellants or their sureties execution may issue against their goods, chattels, and lands, for the sum of two hundred & fifty dollars.

Now, therefore, it is hereby stipulated and agreed for the benefit of whom it may concern, that the stipulators undersigned shall be, and each of them is, bound in the sum of two hundred & fifty dollars, conditioned that the libellants above named, shall appear and answer to the cause, and to interrogatories, and shall pay all such costs as shall be awarded against them by this court, or in case of appeal by the appellate court.

HENRY B. MERRILL,
By GEO. K. RACKETT,
His Agent.
GEO. K. RACKETT,
HENRY S. RACKETT.

Taken and acknowledged this 23 day of Dec., 186 , before me.
JOHN A. OSBORN,
U. S. Commissioner.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Henry S. Rackett & Geo. K. Rackett, *Geo. K. Rackett*, parties to the above stipulation, being duly sworn, doth each depose and say, that he resides in the city of New York, and he, H. S. Rackett resides in Brooklyn; and that he is worth the sum of five hundred dollars, over and above all his just debts and liabilities.

GEO. K. RACKETT.
H. S. RACKETT.

Sworn to this 23 day of Dec., 1868, before me.

JOHN A. OSBORN,
U. S. Commissioner.

Recorded the day of , 186 .

Clerk.

8

9 SOUTHERN DISTRICT OF NEW YORK, *ss:*

The President of the United States of America, to the marshal of the southern district of New York, greeting:

Whereas a libel hath been filed in the district court of the United States, for the southern district of New York, on the 23rd day of Dec., in the year of our Lord one thousand eight hundred and sixty eight, by Henry B. Merrill et al. vs. The Schooner Mary Eveline, her tackle, &c., collision, $3,489 37/100, for the reasons and causes in the said libel mentioned, and praying the usual process and monition of the said court in that behalf to be made, and that all persons interested in the said sch'r or vessel, her tackle, &c., may be cited in general and special, to answer the premises, and all proceedings being had that the said sch'r or vessel, her tackle, &c., may, for the causes in the said libel mentioned, be condemned and sold to pay the demands of the libellant:

You are therefore hereby commanded to attach the said sch'r or vessel, her tackle, &c., and to detain the same in your custody until the further order of the court respecting the same, and to give due notice to all persons claiming the same, or knowing or having anything to say why the same should not be condemned and sold pursuant to the prayer of the said libel, that they be and appear before the said court, to be held in and for the southern district of New York, on the 12th day of Jan'y next, at eleven o'clock in the forenoon of the same day, if the same shall be a day of jurisdiction, otherwise on the next day of jurisdiction thereafter, then and there to interpose a claim for the same, and to make their allegations in that behalf. And what you shall have done in the premises, do you then and there make return thereof, together with this writ.

Witness the honorable Samuel Blatchford, judge of the said court, at the city of New York, in the southern district of New York, this 23rd day of Dec., in the year of our Lord one thousand eight hundred and sixty-eight, and of our independence the ninety-third.

GEO. F. BETTS, *Clerk.*

R. H. HUNTLY,
Proctor for Libellant.

10 (Indorsed:) Vol. 22, page 401. Southern district of New York. United States district court. Henry B. Merrill & al. vs. The

Schooner Mary Eveline, &c. Monition ret'ble Jan'y 12th, 1869. R. H. Huntly, proctor for libellants. Filed January 12th, 1869. I hereby depute L. Bates to execute the within process. Dated Dec. 23, 1868. R. Murray, U. S. marshal,

In obedience to the within monition, I attached the schooner Mary Eveline therein described on the 7th day of January, and have not given due notice to all persons claiming the same, that this court will, on the 12th day of January inst., (if that day should be a day of jurisdiction, if not, on the next day of jurisdiction thereafter,) proceed to the trial and condemnation thereof, should no claim be interposed for the same.

R. MURRAY,
U. S. Marshal.

Dated Jan'y 12th, 1869.

11 At a stated term of the district court of the United States of America for the southern district of New York, held at the United States court-rooms in the city of New York, on the twelfth day of January, in the year of our Lord one thousand eight hundred and sixty-nine.

Present, the Honorable Samuel Blatchford, district judge.

THE SCHOONER MARY EVELINE, HER TACKLE, &c.,
vs.
HENRY B. MERRILL ET AL.

And now, John W. Petty, part owner of the said schooner Mary Eveline, intervening for the interest of himself & Isaac Homan in the said schooner, appears before the honorable court and makes claim to the said schooner, &c., as the same are attached by the marshal, under process of this court, at the instance of Henry B. Merrill et al., and the said John W. Petty avers that the said owners were in possession of of the said schooner at the time of the attachment thereof, and that the persons above named are true and bona fide owners of the said schooner Mary Eveline, and that no other person is the owner thereof; wherefore, they pray to defend accordingly.

J. W. PETTY.

Sworn to and subscribed this 12th day of January, A. D. 1869, before me.

GEO. F. BETTS,
U. S. Commissioner.

F. A. WILCOX,
Proctor for Claimants.

12 (Indorsed:) Vol 22. No. 401. United States district court for the southern district of New York. The sch'r Mary Eveline, &c. asm. Henry B. Merrill. F. A. Wilcox, proctor for claimant. Claim of owner. Filed the 12th day of January, 1869.

13 Respondent's costs.]

Stipulation entered into pursuant to the rules and practice of the court.—Filed the 12 *day of Jan.*, 1869.

District court of the United States for the southern district of New York.

Whereas a libel was filed in this court, on the 23 day of Dec., in the

year of our Lord one thousand eight hundred and sixty-eight, by Henry B. Merrill & others, against the schooner Mary Eveline, her tackle, &c., for the reasons and causes in the said libel mentioned, and praying that said schooner be condemned, &c., and the parties hereto hereby consenting, and that in case of default or contumacy on the part of the cl'm'ts or their surety execution for the sum of two hundred & fifty dollars may issue against their goods, chattles, and lands; and whereas, also, a claim has been filed in said cause by John W. Petty:

Now, therefore, it is hereby stipulated and agreed, for the benefit of whom it may concern, that the stipulators undersigned shall be, and each of them is, hereby bound in the sum of two hundred & fifty dollars, conditioned that the cl'm'ts above named shall pay all costs and expenses which shall be awarded against them by the final decree of this court, or, upon an appeal, by the appellate court.

J. W. PETTY.
ISAAC HOMAN.

Taken and acknowledged this 12th day of Jan., 1869, before me.
GEO. F. BETTS,
U. S. Commissioner.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Isaac Homan, party to the above stipulation, being duly sworn, doth depose and say that he resides in the eastern district of New York, & that he is worth the sum of five hundred dollars over and above all his just debts and liabilities.

ISAAC HOMAN.

Sworn to this 12th day of Jan., 187 , before me.
GEO. F. BETTS,
U. S. Commissioner.

Recorded the day of , 187 .
Clerk.

14

15 *Bond to marshal. (Act of Congress, March 3, 1847.) Filed the 12th day of January, 1869.*

District court of the United States of America for the southern district of New York.

Know all men by these presents that we, Joh' W. Petty & Isaac Homan, are held and firmly bound unto Robert Murray, marshal of the United States for the southern district of New York, in the sum of sixty-nine hundred & seventy-eight $\frac{74}{100}$ dollars, to be paid to the said Robert Murray, for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents, sealed with our seals and dated the 12th day of Jan'y, in the year of our Lord one thousand eight hundred and sixty-nine.

Whereas a libel has been filed in the district court of the United States for the southern district of New York, on the 23rd day of Dec'r, in the year of our Lord one thousand eight hundred and sixty-nine, by Henry B. Merrill & als., libellants, against the Sch'r Mary Eveline, for

the sum of thirty-four hundred & eighty-nine $\frac{37}{100}$ dollars, on which process of attachment has issued, and the said schooner is in custody of the marshal under the said attachment, and John W. Petty has applied for a discharge of said schooner from the custody of the marshal, and has filed a claim claiming the said schooner as owner, and has filed a stipulation for the claimant's costs, pursuant to the rules and practice of the said court:

Now, therefore, the condition of this obligation is such, that if the above-bounden John W. Petty & Isaac Homan shall abide by and perform the decree of this court, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

J. W. PETTY. [L. S.]
ISAAC HOMAN. [L. S.]

Sealed and delivered, and taken and acknowledged this 12th day of Jan., 1869, before me.

GEO. F. BETTS,
U. S. Commissioner.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

Isaac Homan, being duly sworn, deposes and says that he resides in the eastern district of New York; that he is worth the sum of thirteen thousand nine hundred & fifty-six $\frac{48}{100}$ dollars, over and above all his just debts and liabilities.

ISAAC HOMAN.

Sworn to this 12th day of Jan., A. D. 1869, before me.

GEO. F. BETTS,
U. S. Commissioner.

I approve of the sufficiency of the sureties to the within bond. Dated this 5th day of May, 1869.

SAM'L BLATCHFORD, *D. J.*

Recorded the day of , 18 .

Approved.

R. H. HUNTLY,
Proct. Lib'l'ts.

16

17 At a stated term of the district court of the United States of America for the southern district of New York, held at the U. S. court-rooms, in the city of New York, on Tuesday, the 12th day of January, in the year of our Lord one thousand eight hundred and sixty-nine—

Present, the Honorable Samuel Blatchford, district judge.

THE SCHOONER MARY EVELINE, &C.,
asm.
HENRY B. MERRILL ET AL.

On filing claim and stipulation for claimant's costs, together with a bond, under the act of Congress, in double the amount claimed, ap-

proved by the district judge: On motion of F. A. Wilcox, proctor for the claimant, it is ordered that the appearance of the claimant be, and the same is hereby, entered, and that a copy of this order be delivered to the marshal.

18 (Indorsed:) Vol. 22. No. 401. United States district court for the southern district of New York. The Schooner Mary Eveline, &c., asm. Henry B. Merrill & als. F. A. Wilcox, proctor for cl'ts. Order to marshal. Filed the 12th day of Jan'y, 1869.

19 To the Honorable Samuel Blatchford, judge of the district court of the United States for the southern district of New York:

The answer of John W. Petty and Isaac Homan, sole owners and claimants of the schooner "Mary Eveline," to the libel of Henry B. Merrill and others herein, respectfully shows—

First. That the said respondents have no knowledge of, and, therefore, leave the libellants to prove the same as they may be advised as to who were the owners of the sloop Ethan Allen at the time mentioned in the said libel, nor of the cargo laden on board, nor of the amount nor value of said cargo, as is alleged in said libel.

Second. The respondents, in answer to the first article of said libel, and the statements therein contained, aver that they have no knowledge of the same, and leave the libellants to make such proof thereof as they may be advised.

Third. The respondents deny the statements in the second article of said libel contained, except as herein admitted, and aver that the following is a true and correct account of the said collision: That, at about the time mentioned in said libel, the wind being about southwest, and the tide ebb, which was running at between five and six knots an hour, the said schooner "Mary Eveline" was beating the East River, bound to New York from Riker's Island, and had reached a point just below Flood Rock, in Hell-Gate, when two large vessels were discovered ahead tacking in opposite directions, beating down the channel
20 to the westward of Blackwell's Island towards New York; that the Mary Eveline was gaining upon them, and, in consequence, she took the channel to the eastward of Blackwell's Island, having another schooner, the "Hawley," a little ahead, and to the windward of her; that, having beaten out her tack to the eastward and ran, as near as they could, to the west shore of Long Island, just below Hallett's Cove, the Hawley and the Mary Eveline went about, but the Hawley being at such a distance ahead as that she had, or was about changing her tack again to the eastward as the Mary Eveline was in the said act of going about and tacking to the westward from Hallett's Cove. That, to avoid the "Hawley," the "Mary Eveline" took a direction to the leeward and stern of the "Hawley," that being the only direction and course she could possibly have taken, and had just cleared the stern of the "Hawley." That, at this time the said sloop "Ethan Allen" was sailing up the east channel to the eastward of Blackwell's Island, and had reached a point about half a mile from the northern point of the said island, and about nearly the centre of the said channel, sailing before the wind, leaving her boom on her port-side, and about one hundred yards on the port bow of the "Mary Eveline," which was in the act of going about, following the "Hawley," and nearly head to the wind, with the helm-sheets flowing, and the helm hard alee, when the said sloop Ethan Allen, instead of keeping out of the way, and luffing or keeping off, as she clearly should have done, and with main-

sail and jib set and under full headway, sailing at about seven
21 knots an hour, ran into and against the schooner "Mary Eveline," striking her cathead against her stem, knocking her forefoot off, and splitting the stem of the "Mary Eveline," and doing other serious damage to the extent of fifteen hundred dollars. That, owing to the sudden and confused orders on board the Ethan Allen, keeping off, and then immediately luffing, it became impossible to avoid said collision; and that the same occurred wholly through the fault and negligence of the said sloop "Ethan Allen," and of those navigating her, and was in no way the fault of the "Mary Eveline," or of those having charge of or controlling her; that the Ethan Allen sunk in a few minutes, but as to whether the same, or the cargo laden on board, and other articles mentioned in said libel, became a total loss, or were damaged seriously, respondents have no knowledge, and leave the libellants to make such proof thereof as they may be advised.

Fourth. That as to the statement in the third article of said libel contained, the repondents have no knowledge, and leave the libellants to such proof thereof as they may be advised.

Fifth. That as to the allegations in the fourth article of said libel contained, the respondents have no knowledge, and, therefore, leave the libellants to make such proof as they may be advised.

Sixth. The respondents deny the statements in the fifth article of said libel, except that the respondents admit the jurisdiction of this court.

22 Wherefore the respondents and claimants pray the said libel may be dismissed, with costs.

JOHN W. PETTY,
& ISAAC HOMAN.
By their attorney, F. A. WILCOX.

F. A. WILCOX,
Proctor for Cl'm'ts.

Sworn to before me this 14th day of January, 1869.
GEO. F. BETTS,
U. S. Comm'r.

(Endorsed:) 22. 401. U. S. district court. Henry B. Merrill et al., vs. The Schooner "Mary Eveline," her tackle, &c. Answer. F. A. Wilcox, proctor for cl'm'ts. Filed Jan. 19, 1869.

23 *Testimony on trial.*

U. S. district court, eastern district of New York.

JOHN W. PETTY ET AL. } F. A. Wilcox.
vs.
HENRY B. MERRILL ET AL. } R. H. Huntley.

HENRY B. MERRILL ET AL. } R. H. Huntley.
vs.
THE SCHOONER MARY EVELINE, &C. } F. A. Wilcox.

Honorable Charles L. Benedict, district judge.

APRIL 21ST, 1869.

JAMES SIMMONS, being duly sworn and examined, deposes and says: I live in North Carolina; am 54 years old; have followed the water

for 30 years; have been master. Recollect this collision. I was acting mate of the Mary Eveline at the time; have been on her some six months. The collision was on the 20th of September, 1868. The Mary Eveline was bound to New York from Bridgeport light. Wind was from the southwest, I should judge. I didn't see the compass. It was about an 8-knott breeze. We were under single-reefed mainsail, whole foresail, and standing jib. We had anchored at Riker's Island, waiting for tide to make *a*, so we could come this way for the ebb-tide. The ebb-tide had been running about two hours at the time of collis-
24 ion. I should suppose that was the straight time of the tide. It was running straight at the time. The wind blowed pretty much straight up channel; possibly a little off the Long Island side. Don't think there was much difference in our tacks; at times one leg might have been a very little longest; very little difference; there was a schooner ahead of us—the Hawley. Saw the Ethan Allen well down the channel. She might have been half way through. We were just below the short turn then. Think we made three or may be four tacks after I saw the Ethan Allen before the collision. I was forward on the Eveline. The Eveline and the Hawley were on the same tack at the same time after I saw the Allen. When the Hawley tacked the last time before the collision on Long Island shore, we were following pretty much in her wake. We must have been within 25 feet of the Long Island shore when we filled away on last tack before the collision on the Long Island shore. The Mary Eveline is 160 feet long, about, over all. When I first saw the Ethan Allen, I think she was rather closer to Blackwell Island shore. When we had filled away from the Long Island shore, the Hawley was a little on our starboard bow, and about one hundred feet ahead of us, standing over to Blackwell's Island. The Mary Eveline was then within about 25 feet of Long Island shore. I saw the Hawley begin to tack again. When she commenced that we had ranged ahead but very little; we were still pretty close to
25 Long Island shore. When I saw the Hawley begin to change her head to come about, I don't think there was more than 100 feet between our bow and her stern. The Hawley was then about 200 feet from Blackwell's Island. She was then a little on our starboard bow. I was on the forecastle of the Mary Eveline, forward. We had not then gathered headway enough to undertake to tack. We *was* then may be 30 feet from Long Island shore. As the Hawley came round, our stem pointed about in range of her forecastle—about there. If we had kept right on we should have struck her. We kept away a little, to clear her, under her stern. We didn't go any nearer Blackwell's Island than she did. We tacked right in her wake as near as we could. I don't think our larboard forward shrouds cleared the end of the Hawley's main-boom more than the width of my hand. Hard alee was the order given on our vessel. It was promptly obeyed. I raised up the jib sheet. We had four men on board all told. Myself and another man were forward, the captain at wheel, and another man with him. When we commenced coming to the Allen bore on our port bow, rather inside of us, nearer to Blackwell's Island. I should think the Allen was then about 100 feet from Blackwell's Island shore. Our stem came in contact with her starboard bow; our stem then pointing rather over to Blackwell's Island. She was not then quite head to wind, as near as I recollect. I don't think we could have gone inside of her. Think we were one-quarter of the length of the island down the
26 channel at the time of collision. We were going may be 4½ or 5 knotts when she was going her best, under full headway. At the

blow our sails were lifting. Saw a change in the course of the Allen after we commenced tacking. It was to the eastward, off Blackwell's Island. I think she changed a point or a point and a half to eastward. If the Allen had not been there, it is likely we should have gone within one hundred feet, or may be nearer, to Blackwell's Island. I think we were 125 feet from shore when we came in collision. Didn't notice how far off the Hawley then was. We got fastened with the sloop Ethan Allen; were together for perhaps three-quarters of an hour; think it was longer. Was fast to her rigging when she was sinking. She sunk a little over one-half way over to Long Island side. We had drifted down some, I think, when she sank, as the current was strong. I am not attached to the Eveline now. Left her some time ago. Am not in the employ of her owners. I arrived here on Tuesday from Portsmouth, N. C., where I belong. The Eveline hailed from Brookhaven. The Hawley was a little larger than the Eveline. If the Allen had kept on her course without luffing, I don't think we should have touched her; I know ten feet would have saved the collision. The stem of the Allen was heading little of' Blackwell's Island at the blow. We struck her starboard bow, nearly head on. As we came out by the stern of the Hawley, the Allen kind of yawned out, and we came into her nearly
head on—a little on her—striking her starboard bow about her
27 cat-head. We had then but very little headway, just ranging
ahead a little. I think the Allen was going not over seven knots, if that. The blow didn't knock me down. I knocked our cut-water off and split her stem open, so that we had to go on ways. If the Allen had luffed when the Hawley tacked on the Long Island side, she would have passed us both, and not come near us. I saw no other vessel but the Allen then bound east in that channel.

Cross-examined:

I could see the Allen when she tacked over to the Long Island shore before the collision. There was nothing to hinder me seeing her. I don't recollect how far from shore when we then tacked. I know we tacked as near as we could to the island, and around rocks. I can't say how far the Allen was then from the island. She was nearer to the island than to Long Island. I didn't notice her boom particularly; didn't notice how near her boom was to the island. I saw the Allen pretty much all the time, only when she had shut in behind the other vessel. We were 120 feet, say, from the Hawley when we tacked at the island before the collision, and were, I think, a little farther astern of her than when we tacked again at the island at the collision. We were gaining on her a little. We didn't expect to pass her—couldn't well pass her in that narrow work. We were in the wake of the Hawley when she tacked at the Long Island, and 170 feet behind her. She stood to within about 30 feet of the Long Island shore. I
saw the Allen after we filled away on the tack to Blackwell's
28 Island. She was to westward of the Hawley then. I reckon I
saw the Allen all the time on that tack till the Hawley hid her when she came about. We may have gone one-third the way across when the Hawley hid the Allen from us. The Allen never opened astern of the Hawley till after the Hawley went in stays. The Allen was about, say, 300 feet from us when she opened astern of the Hawley, after the Hawley went about. The Allen was, may be, 75 or 80 feet from shore, or may be more. Captain sung out "Hard alee" as soon as we passed the Hawley's stern, so that we could tack. That was notice to me to light the sails. Nothing was then said on our vessel about the

sloop that I heard. I was forward. We were a little nearer to the Hawley when we tacked this time than ever before; otherwise followed her just as we did on the previous tack. Our vessel worked very well when she had good headway on her; was centre-board schooner. It was very little after the order hard alee, if not at the same time with the order, that I noticed the Allen change her course. We had commenced coming into the wind. The sloop commenced luffing a little bit; kind of yawed to, just as we put wheel down. She was 250 or 275 feet from us then. We were coming into the wind, while she was changing her course. I didn't notice the man at the helm of the Allen.

29 Heard no order given on the Allen. I said nothing to our captain about the Allen. The Allen's change was gradual. I thought a flaw of wind struck him. Perhaps he may have changed his helm some; don't know as he did. Don't hardly think the Allen continued her course till the collision. Couldn't be mistaken about the sloop's luffing a little, because I particularly noticed it. I don't think there could have been a collision if that hadn't happened. We were then still heading toward the Blackwell Island, and coming to the wind, going some four knotts through water. Tide must have been setting us down some five knots. I don't think I could possibly be mistaken as to fact that sloop luffed. I was watching her. At the instant of the blow I suppose we were heading very little, if any, on the island. Our boom was then about midships. The captain was hauling it over. The foresail was off some, about far as the rail. We were compelled to keep off the wind some on the last tack to island to keep clear of the Hawley. When she went about, we kept off more to clear her. Suppose we must have been off two points then. That made us take a little longer to go about on that tack than if we had been close to wind. We had not come into wind any till the captain sung out hard alee. We tacked right in the wake of the Hawley, and were not carried nearer the island than she went. I noticed there were men on the sloop, but no one in particular. I think the Allen changed her course a point and a half. Didn't notice that she changed her course back again. She didn't keep changing. We

30 were about 125 feet from the island when we struck the sloop. The sloop was about the same distance from the island. Our boom was between 50 & 55 feet long. Our sails never filled away on the tack; we drifted with the Allen. The Allen sunk further out on the stream than where the collision occurred. Now, I think it was two hours that we were together before she sunk.

Redirect:

At the blow our vessel was swinging to, coming to the wind.

Cross-x'd:

I am not familiar with the Hell-Gate.

JOHN W. DUDLEY, being duly sworn & examined, deposes and says:

I reside in North Carolina. Am 22 years old. Have followed the water for the last two years. Am now master of the Ella Dudley. I was on the Mary Eveline at the time of the collision. I was a hand on her—had been on her about two months. I arrived in the city on Tuesday. Came as a witness in this case. I was forward at the collision.

THURSDAY.

I saw the Allen before the collision. Can't say what tack we were on when I first saw the Allen. We made three or four tacks after we

saw her before the collision. I think the Allen was very close to the lower end of the Island when I first saw her. She was running nearer to the island than to the other side. Can't say how near to the
31 island she was running. The Eveline had reached the end of the island when I first saw the Allen. The tide was strong ebb, the wind about south-southwest, or southwest by south, blowing very near the channel—seven to eight knotts breeze. We had a reef in our mainsail. The schooner Hawley was just ahead of us. We got underweigh at Riker's Island. Had been waiting for tide there. Had no long leg beating down. The tacks were about equal. As we tacked to Long Island, on tack before the collision, the Hawley bore a little on starboard bow, nearly ahead of us. We were but a short distance from her when we tacked at Long Island shore. The Hawley didn't go quite as close to the Long Island shore as we did. Suppose she went within thirty or forty feet. We ran to within 20 or 30 feet. It was 20 or 30 feet from our stern to the shore after we got about. The Hawley was all the time in sight. I was forward; saw the Hawley when she commenced to tack on the Blackwell Island shore. We had not got entirely filled away then. We had just drawn away our jib. We hadn't got headway from the Long Island shore when the Hawley began to tack. Our stern was within 30 feet from Long Island shore when the Hawley first began to turn and make her tack on the Blackwell Island shore. Our stem was then 100 feet from the stern of the Hawley. We had gathered headway perhaps a little—am not sure of that. When the Hawley turned her broadside, our stem pointed to near her foremast. We couldn't have tacked when the Hawley began to
32 tack. We had no headway to tack with. We had headway when the Hawley got her broadside to us; the course of our vessel was changed to starboard. We kept off a little, no great deal, not over one-half a point. If we hadn't kept off we should have gone into the Hawley. The Hawley forged ahead some in turning. The Hawley's mainboom didn't clear our rigging more than a foot. We saw the Allen as we tacked on the Long Island shore. I suppose the Allen was running 75 to 100 feet off the island. The Hawley didn't go within 100 or 120 feet of the Blackwell Island shore when she tacked. The Hawley didn't run over 10 or 15 feet nearer to the island after she commenced turning her head to tack. We turned right in the wake of the Hawley. Didn't go nearer the shore than she did. Our captain sang out, Hard alee, as the Hawley's boom passed our fore rigging. We were crossing the tide at rate of about three or four knotts. The order of the captain was promptly attended to. We lost sight of the Allen when we came under the lee of the Hawley. The schooner shut her out. I had observed that the Allen had yawned off some from the island shore before the Hawley shut her in. She came in view as soon as we opened her round the Hawley's stern. There was no time after the Hawley began to tack that the Eveline could have tacked before she did. We commenced tacking within 125 to 130 feet from Blackwell's Island shore. About the time we commenced going about the Allen luffed a point, probably more. We were about 125 to 130
33 feet from Blackwell's Island shore when the vessels came in contact. When struck, the Eveline was very near head down river, swinging on our turn. When we struck the Allen, she had fell off towards the shore. She had luffed about a point or more, and then she fell off again just as we came together. When we struck, the vessels were almost head and head. Our starboard bow came into her starboard bow. Ten feet would have cleared us. There was no room for

us to have gone inside and tacked between the Allen and the shore. When we began to swing, the Allen was between 2 & 300 feet distant. The Allen was not going over 1½ to 2 knotts by land. If the Allen had kept her course as she was when we opened her by the Hawley's stern, we might have come alongside a glancing like, but not to do any damage. No other vessels were beating down that I saw. I saw no vessel but the Allen coming up. If, when the Hawley tacked on the Long Island shore, the Allen had luffed hard enough to cross the stream, there would have been no collision. I saw no way for us to avoid the Allen after we went on the tack at Blackwell's Island shore. I let go the foresheet when the captain sung out, hard alee—that was to get the vessel round as quick as possible. Got her about quicker by letting go the foresheet. I think that was the fourth time I had been through there. Our vessel was light. I think we were passing the island at about the rate of 3 to 3½ knots. The wind pressed us up against the tide. Speed on the tack might have been four knotts. About
34 all we made was what the tide carried us against the wind. When we kept off to avoid the Hawley, we might have got ½ to ¾ point off the wind, as near as I can tell. If the Hawley hadn't been there we should have gained a little more on the tack than we did. We were faster sailer than the Hawley. I think the vessels were in contact two hours or more. The Allen commenced to sink right away. Our jib-boom was caught in between her rigging and mast and held her up.

Cross-examined:

I suppose we went 150 feet after our stern pointed to the Hawley's foremast, till we passed her boom. We then headed over towards Blackwell's Island. The Hawley was about head to wind when we were pointing to her foremast. I think she was shaking. She might have filled away, but hadn't much headway, if she had. We were then, I suppose, about 100 feet from her when our stem pointed to her foremast. We were just gathering headway—had very little headway, if any. Our stern was then between 25 and 30 feet from the Long Island shore. We then kept our vessel off a little. As we passed the boom of the Hawley, the Hawley was heading across the river to the Long Island shore—not square across—some on the Long Island shore. We held on till our foreshroud passed the boom of the Hawley. We came up as soon as we passed. Was not turning when we passed her boom. When we passed her boom we were nearer to Blackwell
35 Island side of river. I could then see the Allen from where I stood. The Allen was then heading rather on Long Island shore—rather off Blackwell's Island shore. Her stem pointed a little more off Blackwell's Island shore. She was so heading when I first opened her behind the Hawley. The sloop was then between 350 and 400 feet off when she opened by the Hawley. The Allen was about 4½ points off our port bow, & she was then about 125 feet from Blackwell Island shore. After the Allen opened, I saw her change her course about a point to the eastward—luffed. I saw her luffing soon as we cleared the Hawley's stern. She was luffing when she opened. She luffed about a point, or perhaps a little more. We were within 150 feet, or probably less, from the Allen, when she stopped luffing. She then bore not more than ¼ of a point off our port-bow, being then right ahead. She then fell off a little, not quite as much as she came to. I don't know that any one notified the man at our wheel that the Allen was luffing. The Eveline was turning a little round the Hawley's stern, when I no-

ticed the Allen was luffing. I let go the foresheet, and ran right forward, and saw the Allen luffing. I had not seen the Allen open by the Hawley when I lifted the foresheet up. Saw her when I looked. I had seen her before that. I went forward to help to tend the jib. I had not done that on the previous tacks. I did it now to get the schooner about as quickly as possible. No one told me to do it. I wanted to clear the sloop, was the reason. I went forward to help
36 at the jib-sheet. Generally the captain gave orders when the foresheet was to be let go. He sung out, light up, and I let go the foresheet. I ran to the jib and backed it out. I was busy. The wind was blowing so as to give me about all I could do. We commenced turning before her sails received full force of the wind from out of the lee of the Hawley. The sloop could have luffed so as to avoid the collision, if she had commenced in time. If when the Hawley first tacked on the Long Island side the sloop had luffed, head across the stream, over on the Long Island side, so that we could have gone over to Blackwell Island side, we should have tacked then, and gone around her stern between Blackwell Island and her. There was another way for sloop to avoid the collision. If she had run straight on her course down Blackwell Island shore, that would have avoided the collision, I think. I couldn't tell for certain, but that is my judgment. I don't know as our bowsprit struck the Allen at all. Our jib-boom was jammed in between the mast and rigging on her starboard side. Am not positive as to that. If the jib-boom had gone between the larboard fore-rigging it would indicate that she hadn't fallen off any. I was standing on traveller. Had dropped and jumped up on that to see whether we were going to strike. When I saw we were going to strike, I ran aft. I had run to port side, and stood right to rail. I could see the sloop better from there. As I stood to leeward I could see from her stern one-half way forward, or more, on the Allen. When I
37 went to the tail, I thought she would clear us, going between us and Blackwell Island. As soon as I got to the tail I saw she would hit. I suppose our mainsail was reefed to make our vessel work the better. There *was* from seven to eight knot breeze. I think the sloop was going through the water from 6 to 7 knots. We, after we lifted the sheets, were going down 1½ to 2 knots. There was not room enough for us to come in wind between the sloop and the island. If we had turned to run up in the wind between the sloop and the island, we would have run into the island. The Hawley forged ahead only about what the tide carried her. She was light, I think. When I jumped to the port sail I could see the starboard side of the sloop most. There *was* two men on that side of the mainmast, and I halloed to them to run.

JOHN W. PETTY, being duly sworn and examined, says:

I am one of the libellants; I hail from Brookhaven, L. I.; I am 41 years old; have followed the water 30 years, mostly in fore & afters. I was master when 13 years old, was not master again till I took charge of the Mary Eveline. I was in command of her at this collision. We left Riker's Island about 11 o'clock. When the tide turned, I took the helm and kept it till the collision. It was a clear day with a strong breeze from southwest, a seven-knott breeze, a head wind for us. I didn't notice the Hawley till nearly to Flood Rock; we were
38 obliged to beat for Riker's Island, we had single-reefed mainsail, full foresail, and jib-reefed mainsail, because for my vessel it was blowing too strong to carry full sail. I think the last tack at Long

Island shore was the third tack I had made near the Hawley. There were two large vessels in the other channel, and we therefore took the east channel; there was none but us two beating down the east channel, and only the Allen coming up the channel. At the collision the tide was strength of ebb, about two hours ebb. I saw the Allen before the collision. I was standing to eastward, when I first saw the Allen, to Hallett's Cove; was not yet down to the east end of Blackwell's Island; she was then a mile and a half below the island, and on the Blackwell Island side of the river. I can't say how near she then was to the west side of the river. I kept her in sight after that; her hull was hid by the Hawley part of the time. The Hawley was a little ahead of me, a little on my weather bow, & both standing to Long Island shore on the tack before the collision. When the Hawley began to tack at the Long Island shore she might have been about the length of the schooner ahead of me. The Hawley went 30 feet from shore and she swung round 30 or 40 feet. Our vessel is 160 feet long over all, that is from the end of jib-boom to the end of main-boom. I went rather near' than the Hawley did; my vessel was gaining on the Hawley;
39 when my vessel filled away at Long Island, my stern swung about 25 feet from shore; I was at the wheel, I could see the Hawley from where I stood. I saw the Hawley tack at Blackwell Island. We had filled away when the Hawley commenced to change. Our stern when we filled away was 30 feet from Long Island shore; as near as I can judge, it was 150 to 160 feet from our jib-boom to the stern of the Hawley; we had just begun to gather headway then. I observed the Hawley swing broadside to; our jib-boom ranged right from her foremast then; we couldn't then have tacked because there was no way on the vessel, and there was no room to tack, was so close to Long Island shore; we should have wanted ¾ of the river to have filled away, and then tacked back on the Long Island shore. I kept my vessel off when I saw the Hawley ahead of me broadside to my jib-boom. If I had kept on I should have struck her, the Hawley's hull, a little her mainmast. My foreshroud cleared the Hawley's main-boom not over two feet. I don't believe over six inches. I thought it was going to catch. The Hawley tacked something like 150 or 175 feet from Blackwell's Island shore; I tacked about the same distance from the shore. I did not run in any closer than the Hawley did; I tacked right in her wake. As I went under the Hawley's stern, my schooner was luffing, and when I cleared her main-boom I sung out hard alee. John Dudley let the foresheet go, and the mate let the jib-sheet fly. The steward was
40 aft helping me to haul the main-boom over. This was all to get the vessel about as soon as possible, so as not to interfere with the sloop's coming up on the west side of the river. My vessel acted as quick as usual. I didn't then think there would be any collision. I most assuredly supposed the sloop would go to the Blackwell Island side. There was plenty of room for her to go to the Blackwell Island side. We couldn't have run our ship there. The tide under her lee bow with helm hard aport would have cut her ashore on Blackwell's Island before she would have kept off. When the sloop came in range of the Hawley, I think she was 80 to 100 feet of' the island and below us. I didn't see that the sloop luffed till I came out from the Hawley's stern, and then I saw that she was further from the shore; she was then hauled about one point in the river, or something like that. She kept that luff till almost to the collision. I sung out to the captain of the schooner and told him to keep off. He rolled his wheel off and the vessel kept off a very little; the vessels then couldn't be helped. The

vessels were close together. Ten feet would have cleared the vessels. I judge my bow was about 100 feet from the shore at the blow; we were then almost headed down the river. The sloop was then heading a little towards the island, not quite parallel with the stream. If she hadn't luffed there would have been no collision. She came right under our bow, her starboard cat-head struck our stem, and her cowsprit was broken off. It stuck a little forward of our forechain and seemed
41 to be pried off, and our jib-boom went between her mast and fore-rigging, I can't say which side of the mast. We could do nothing to avoid the collision. We couldn't have tacked before we did and cleared the Hawley. The Hawley was about our size. I am in the habit of going through the Gate. I know now the captain of the Allen; never saw him before the collision. (He is one of the claimants.) I had a conversation with him on my schooner after the collision—a month after the collision.

APRIL 23RD, 1869.

Cross-examined:

My vessel was something like 100 feet from the Hawley when my stem pointed to the foremast of the Hawley; it was between one and two hundred—a length and a half or so from us. The Hawley had then just payed off; she was about ready to start ahead. The sloop was then down the river from the Hawley. Ranging ahead of the Hawley's sails from me, I could just see the sloop ahead of the Hawley, that is in range. I should say the sloop was then 400 feet from the Hawley. The Hawley's stern was then something like 150 feet from Blackwell Island; she had just tacked. The Hawley was then about six points off the wind, heading diagonally across the river. The wind was southwest. We had then just filled away and were perhaps within six points of the wind. We can lay within five points when under good headway and sails well trimmed. As my vessel drawed ahead I kept her off
42 say ½ point to clear the Hawley, then still heading down across the river close hauled; was then within 2 or 3 points of straight across the river. I began to let my vessel luff the moment I saw I could clear the Hawley. The hull of the sloop could not then be seen, for she was deep, and the schooner was between us. I could see her sails right in range of the Hawley. I saw her hull as soon as I opened her by the Hawley. I was then luffing. I did not notice that the sloop was luffing till I came out from under the stern of the Hawley. I saw then she had luffed; she was then 200 or 250 feet from me, a little on my weather bow. The sloop was then something like 100 or 125 feet from Blackwell's Island. I should think she was 125 feet from the island. I was on a circle luffing; the sloop was then nearer Blackwell Island than I was. It was then I slung my hand to the captain of the sloop; I was then 200 to 250 feet from the sloop. The Hawley was then standing across to Long Island shore. I swung my hand as soon as I perceived the sloop had luffed, soon as I saw her, as I swung around by the Hawley's stern. It first seemed to me that the sloop luffed as fast as the schooner did. She kept luffing till within about 70 feet and then rather turned to the westward as they came together. We struck her about over her cat-head, about 8 feet from her breast-hook. At the blow my forward sails were lifting in the wind. The main-boom was hauled to westward and had got midships, I think. I think the
43 sloop was 100 feet further from the shore at the collision than she

was when she was 60 rods below. A very little luff in that tide would change her rapidly. I observed no change in the helm of the sloop till I thought I saw the captain roll the wheel up. No vessel with that wind and tide, under that sail the sloop had, could be kept straight, because it was blowing a very fresh breeze right off. The main-boom was off on port side. She was deep, and drove against a current so strong that her bowsprit was not 18 inches from the water. She would yaw; I say this from my exper'ence on sailing vessels. I have never sailed this sloop. It would take an excellent helmsman to keep her within a point off her course. I have sailed longest in sloops, fartherst in ships, and least in schooners—long enough in any of them. I should say I was 100 or 150 feet from Long Island shore as I began to turn at the tack on that shore. I came about much on our usual gait—came around our usual way of coming. I did not notice whether the sloop's peak was slacked; if it was slacked it must have been but a very little or I should have noticed it. I noticed that she had clewed up her topsail, but I never noticed that her peak was dropped; if it was it must have been a very little. I am familiar with the Gate; have navigated it off and on for 30 years. The sloop sank very rapidly after the blow, should say in five minutes she was on the bottom, but our rigging was caught, and we were held by her for an hour & a half or two hours.
44 My vessel will tack in 250 feet in such a wind and tide as this was. The sloop wouldn't have had to luff two points to clear both vessels if she had begun when the Hawley began to luff at the Long Island shore. When a vessel yaws she goes first one way, then the other. When I say it would be difficult to keep her within a point of her course, I mean ½ point either way. The sloop and we were at the collision approaching each other at a speed combined of about eight miles an hour.

MONDAY, *April 25th*, 1'69.

BARTLETT HORTON, being duly sworn and examined for libellant says:

I was 18 years old last November. I follow the water; hail from Patchoge; have followed the water for the last four years. Was on the Mary Eveline at the collision; was steward on the Mary Eveline; I was tending the main-sheet. I saw the Ethan Allen before the collision; had then just gone about on east side. I saw no other vessel but her heading east—none but the Hawley near us, beating down. The first I saw of the Allen was when we came round on the Long Island tack. The Hawley tacked first on the Long Island shore; she was ahead of us a little on the weather bow when she commenced to tack; she was between 2 and 300 feet of us when we commenced to tack. I was aft on our vessel when we began to tack, and re-
45 mained on deck till the collision. Our stern was, say, 25 feet from the Long Island shore when we tacked at the Long Island shore. When we got headed on a course toward Blackwell Island shore the Hawley bore a little on our weather bow; was about 200 feet from the Hawley's stern to our jib-boom then. I had then seen the Allen. Saw her after we commenced tacking on the Long Island shore. I should think she was coming along about 100 feet from Blackwell Island shore. She was down the river, a little off our weather bow. Our stern was then about 25 feet from Long Island shore. I saw the Hawley commence to tack on Blackwell Island shore. When she began to tack I think she was about 200 feet from the Eveline. I saw the Hawley when she got broadside nearly turned to us. Our stem then pointed,

very near for her foremast. We then rolled our wheel up and kept her off so as to pass the Hawley's stern. We had then got from 3 to 400 feet from the Long Island shore when our wheel was rolled. The Hawley turned near 150 feet from the Blackwell Island shore. After we kept off we were heading a little down the river—not directly over to the island. We just cleared the main-boom when we tacked. The fore-rigging went within two feet of the main-boom of the Hawley. We didn't stand any nearer to Blackwell's Island shore than the Hawley had. We couldn't have tacked before we did. The order was from the captain, Hard alee. The Allen was shut out from our view partly when the Hawley tacked. I was then tending the main-sheet. As soon as we shot past the Hawley's stern I noticed the Allen again. She
46 was then about the same distance from the Blackwell Island shore that she was when I noticed her before. I had not noticed any change in her up to that time. I saw her luff before the collision. When I saw her luff she was about 400 feet from us down the river. We had commenced to tack when I saw her luff. I didn't notice that she changed her course again before the collision. She luffed about 1½ point', and then steadied for a little ways. I think she then kept off a little before we came together. She was about one length off then, I think. I saw some one at the wheel when we went about. I saw our captain swing his hand; it was just after he sung out hard alee. She was coming round—we had then luffed. I saw the man at the Allen's wheel leave his wheel; that was after I saw her keep off. The collision took place within 100 feet from shore I should say. I think the Allen kept off about as much as she luffed. We were right on line where the Hawley had tacked at the time we struck her. The Hawley had been gathering headway, and was standing on her tack ¼ way across the river. It was blowing about a seven-knott breeze; we were crossing the tide at a rate of about five knotts. The combined speed of the Eveline and Allen at the collision was about nine or ten knotts. Fifteen feet change would have cleared us easy enough. We couldn't come around any quicker than we did. There was not room to tack be-
47 tween the Allen & the island. The two vessels came together, our stem striking her cat-head on her starboard bow; our jib-boom went on the starboard side of the Allen's mast. The wind was about southwest, blowing right up the channel. The tide was strong ebb. I judge the river to be between 5 and 600 feet wide there. I am not attached to the Eveline now. The collision was just near the lunatic asylum. We were a little past the dock. I remember seeing the dock; we had got about one length past the dock.

Cross-examined:

We were within 100 feet of the Long Island shore when we commenced our tack on that shore. I think we were 75 feet off when the sails shook, and were 25 feet as our sail swang round and we filled away. We went about with usual speed on that tack. The Hawley was about 100 feet from Blackwell's Island shore when we went about; that was the nearest she went to the shore. The Hawley was in the middle of the river when our stem was pointing to her foremast. She was under full headway. She had run some 200 feet on her tack when we rolled our wheel up; she was then 300 feet from shore. I guess the Hawley was 300 feet from Blackwell Island shore when our fore-shroud passed her main-boom, and the instant our shroud passed the boom our captain rolled her wheel down and sung out, Hard alee; we were then about 100 feet from shore. I helped to pull the boom over as soon as

the sail shook; we hauled it over with a notch-rope, and not
48 with a tackle. I was standing on the lazy-board. I saw the sloop when she commenced luffing. I think she had then opened under the stern of the Hawley. I don't know what I was doing at that time. I was then on the quarter somewheres. but can't say whether windward or leeward, or midships. The captain had not then sung out hard alee. When I noticed the man leave the wheel on the Allen, our jib was backed out to leeward, and the other sails were shaking. I was then on the quarter; was then pulling over the boom, and on the port side. I asked the captain if he saw the sloop, and he said he did. This was while I was hauling the boom over, and the sails were shaking. I don't know that I had heard any one on our vessel speak of the sloop. I suppose our stern was then swinging round; our bow might have been 150 feet from the Allen when I saw the man leave her wheel; can't say exactly. I am sure our bowsprit went on the starboard side of the sloop's mast. I don't know whether we tore the sloop's mainsail. I didn't call the captain's attention when I saw the sloop was luffing, nor did I hear him speak of it as I recollect.

Redirect:

We didn't stand on any after our shroud passed the Hawley's boom. The Hawley had then gathered headway. We were then not far from 150 feet from the Blackwell Island shore. The Hawley was then outside.

49 Re-cross-ex'n:

When I saw the man run from the wheel, the sloop was, if anything, little on our starboard bow—about ahead. The Hawley was always further down the stream than we were. Her bow was not to leeward of our course at any time after she came about.

JAMES SIMMONS, recalled, says:

We could, by turning at once from the Long Island shore, have gone up the river; but I don't think we could have again got round on our course.

Libellants rest.

Deposition of Charles Bennett for claimant.
" " John M. Andrews "

HENRY B. MERRILL, being duly sworn, says:

I am one of the claimants. I reside in Greenport, Long Island. I have followed the water for 31 years; was master of a vessel for the last 15 years, passing through the Gate from spring to fall every year. I was master of the sloop Ethan Allen and part owner of her. I was at the time bound to Middletown, Conn., loaded with one-half fine sand and one-half fine clay—deep. The sloop was 75 tons. I should judge her length 125 feet over all. I had two men besides myself. I was at the wheel, and the others stood close by me, on the starboard side of the quarter-deck. We entered the channel by the south end of Blackwell's Island at 1½ o'clock p. m. The wind was southwest; pretty near
50 through the channel, our boom was on the port side; we had the mainsail and jib-peak settled; was steering along on the west side of the channel, under Blackwell's Island. It was about a seven-knott breeze. The island is, I should judge, ¾ of a mile long. I was sailing about 70 or 75 feet from the island; go so near to keep in the eddy tide. The tide was ebb, running strong. I observed two schoon-

ers beating down. I was about one-half way up the island when I first saw them; they were then just coming by the east point of Blackwell Island, and were then on the starboard tack, standing to the eastward, towards Long Island. I did not lose sight of them after that till after the collision. I think they made one more tack to Long Island in addition to the one they were on when I first saw them. They proved to be the Mary Eveline and the Hawley. On the last tack to Long Island shore the Hawley was ahead but a little. The Eveline tacked right under the Hawley's wake, a little to the leeward of her, and both vessels stood on. As this time I was close under Blackwell Island, ranging up the river, off their port bow. I stood on my course; the two schooners kept their course until the Hawley had stood out her tack; then she put her wheel down, and came around; when she was in the wind, I was off her port bow, towards the island. At that time the Eveline kept off and went round to the leeward of the Hawley. I should think she went 1½ point' free from the wind in passing to leeward of the Hawley. While the Hawley was in the act of filling away, the Eveline came out around the stern. I saw the captain of the Eveline put his wheel down;
51 the Hawley tacked outside of the sloop, about 50 feet, the sloop being then about 75 feet from Blackwell Island. In about one minute after I saw the captain of the Eveline put his wheel down, she struck the sloop in her starboard bow, near the cat-head stem, near the flying jib-boom, passing to leeward of my mast—passing between the rigging and mast and through my mainsail. This diagram shows the portions of the vessels at the blow. (Diagram marked Exh. 1, C. L. B.) The Eveline was about 125 feet from Blackwell Island when I noticed her open by the stern of the Hawley. She put the helm down as soon as she opened by the stern of the Hawley. The Eveline was then heading very near on to the island, and one point free from the wind, heading a little down, probably not over one point from directly on the island; it might have been a little more than that. The whole of the Eveline came in right astern of the Hawley before she commenced luffing, otherwise I could not have seen the captain when he put his wheel down. She shot on beyond the track in which the Hawley turned; she went about 50 feet nearer the island than the Hawley did. Under the circumstances it was necessary that the Eveline should go nearer than the Hawley did; she would lose her way a little when under the lee of the Hawley, and when she took the breeze again it must first catch her head sails, and so cut her in nearer the shore; she wouldn't turn as quick as if there was nothing to take her wind. When the Hawley put her helm down to go about, the Eveline was about 1½ length' from her.
The Eveline should have put her wheel down when the Hawley
52 did, and come in stays; she had room to do so; there was nothing to prevent it. The Eveline had then gone nearly across the river, after falling away on the Long Island shore when the Hawley tacked. The Hawley stood her full tack out—I mean she stood as far as she would if the sloop had not been there, and keep in true tide. In beating in the tide it is necessary to keep out of the eddy, otherwise the eddy might take them ashore. My boom was about 55 feet long; it hung about two points abaft my beam, on the port side; the end of it, as I passed along, while the schooners were tacking on the Long Island shore, was from 10 to 15 feet from the island. When the Eveline began to luff, she was outside of my course; she was then probably 200 feet from my vessel. After she put her helm down, she kept approaching the island. When we struck, the combined speed of the vessels was about nine knots. I did not leave my helm. Horton was mistaken

when he said I left my helm. I did not luff at any time, nor did my vessel yaw. The libelant's witnesses are wrong about that. I did not keep away because it would exposed me more to the bow of the Eveline. The sloop wouldn't have luffed to exceed a point in that short distance. At the blow I was about 75 feet from Blackwell's Island. I saw the Allen when she was raised—she has been raised. It showed the blow close to the starboard cat-head, about seven or eight feet from the stem. The hole was a crush right in; it was diagonally across the bow. The collision occurred just below the dock—the lunatic dock. I make
53 the river, by the chart, 740 feet wide there. I didn't see the captain of the Eveline wave his hand at me.

Cross-examined:

My sloop was 41 tons' measurement; her width was 20 feet. I do not own her now; she is still in existence, sailing. The length of the Eveline and the Hawley over all was about the same—say 160 feet each. When close-hauled the boom is generally over lee davit. There is an eddy on that stage of the tide by the Blackwell Island shore about 75 feet wide. The tide don't set in an opposite direction, but is a slacker tide. There is no slack water on the Long Island shore there with the ebb tide. I had the wind free. I didn't change my course at any time after I saw these vessels. I made an effort to avoid them by keeping close to the island. I did nothing to avoid them, but keep my course. I saw they were beating when I first saw them; they continued to tack up to the collision. I saw, as they crossed to Long Island, that the Eveline was a little to the leeward of the Hawley. The Hawley tacked first. When the Hawley got round on her tack at Long Island, she was 100 to 150 feet from Long Island when she got round; she was not nearer to shore than 100 to 150 feet. I noticed that the Eveline went round the Hawley's stern at the Long Island tack; when she went around her stern the Hawley had filled away at Long Island shore; that brought the Eveline considerably nearer to the Long Island shore—probably she went within about 50 feet of the Long Island shore. I observed all this.
The Hawley was drawing ahead on her tack, while the Eveline
54 was coming about on the Long Island shore. The Hawley crossed the tide towards the island, perhaps, at a rate of five knotts after she got headway on her. The Hawley was, perhaps, 200 feet from the Long Island shore when the Eveline was in the wind, before she got filled away on her tack, or 250 feet when the Eveline got filled away on her tack. The Hawley might have been between 300 to 350 feet from the Long Island shore—I mean her stern was 300 to 350 feet from the shore. The distance between the Eveline and the Hawley at the time the Eveline got filled away, they may have been 200 feet apart, that is, from the end of the jib-boom to the stern of the Hawley. The Eveline was then a little to the leeward of wake of the Hawley. The Hawley commenced to tack when she was 150 feet from the Blackwell Island shore. The Eveline kept away just about the time the Hawley commenced turning. As she turned she hid the Eveline from me. The Hawley had not filled away, but was filling away as the Eveline's stem came to her stern; she was forging ahead some. A vessel's stern does not swing further than her bow in any state of tide in tacking under headway. I saw the captain of the Eveline put his wheel down; he hadn't put it part down before because, if he had, he would have hit the Hawley. The Eveline had a standing wheel, I think—I am not sure. No part of the Eveline was at any time inside of me—between me and Blackwell's Island shore. I thought there would be a collision

55 as soon as I saw her begin to tack. The Hawley had commenced drawing ahead when I saw the Eveline's wheel hove down. There was no time, after the Eveline commenced swinging, that she changed her swing; she was swinging slowly when she came together.

Re-direct:

When I saw the vessels tack at Long Island shore I was not in a position to luff off to Long Island shore.

Q. Why not?

A. After the vessels had drawn across the river toward me I could not luff off; there was not room enough. They were driving down river. I was 500 or 600 feet below them when they tacked; I was going about five knotts, and the Hawley at same speed.

APRIL 27*th*, 1869.

THOMAS BRENANN sworn on behalf of respondent:

Examined by Mr. Huntley.

Q. What was your occupation last September?

A. Steward on Blackwell's Island; had charge of the guard.

Q. Had charge of the guard-boat?

A. Yes, sir; on the eastern channel of Blackwell's Island.

Q. As such, what was your business?

A. Pulled up and down the river, and looked out for a boat on this Sunday coming along to take away prisoners.

Q. This collision was on Sunday?

A. Yes, sir.

Q. Did you see this collision?

56 A. Yes, sir.

Q. State where your boat was.

A. About 25 feet from Blackwell's Island, and about 50 feet from where the collision occurred, between Lunatic Island dock and the Retreat.

Q. (By Mr. BEEBE.) Fifty feet nearer the shore?

A. 25 feet from the shore, and about 50 feet up from the collision.

By Mr. Huntley:

Q. By "up," you mean which way?

A. *For*wards Hell-Gate; the tide was running down.

Q. When did you first observe the two schooners that you saw?

A. When they were coming across from the Long Island shore towards the Blackwell's Island shore.

Q. You are now speaking of the last tack they made towards Blackwell's Island before the collision?

A. Yes, sir.

Q. Did you at that time notice the sloop?

A. Yes, sir; I noticed the sloop.

Q. How far was the sloop from Blackwell's Island at that time?

A. 70 or 75 feet, I guess.

Q. Was she within what is called the eddy?

A. Yes, sir; she was in the eddy.

Q. How far out does that eddy extend?

A. It extends out about 70 feet at that point where he was. There are places along the Island where it don't come out two feet. The eddy runs right along the wharf, but there it was about 70 or 75 feet.

Q. Did you notice the foremost one of these schooners, the Hawley, when she tacked?

57 A. Yes, sir.

Q. Under the Blackwell's Island shore?
A. Under the Blackwell's Island shore.
Q. How far from that shore was she when she tacked?
A. When she started to tack?
Q. Yes.
A. She must have been about 200 feet when she started to tack.
Q. How near did she reach the Blackwell's Island shore?
A. She reached within about 150 feet.
Q. When she started to tack where was the "Mary Evily," the other schooner?
A. Coming right up behind her.
Q. How far from her?
A. Well, I should say about 200 feet, I guess, when she started to tack.
Q. Did you notice the Hawley go abont?
A. Yes, sir.
Q. When the Hawley was about and her sails drew full of wind, where was the Mary Evily?
A. She was coming right close to her at that time, when she went to go back again to Long Island; at the time she was going across, over to Long Island, the Mary Evily was coming very close to her, say about 20 feet; I should say that she was that far.
Q. And passed along where?
A. Passed along right astern of her.
Q. When the Mary Evily passed the stern of the Hawley, how far was the Hawley from Blackwell's Island?
A. When she passed the stern of her, I should say she was 125 feet, or so.
Q. The Hawley was?
58 A. Yes.
Q. How near did I understand you to say was the nearest the Hawley came to Blackwell's Island?
A. I should think 150 feet; somewhere around there.
Q. State what you mean by saying the Hawley at that time was 125 feet from off Blackwell's Island when the Mary Evily passed her stern.
A. I mean after she turned around to come over to Long Island that she was about astern of her; whether she was about then or not, I didn't notice; it was about 125 feet from Blackwell's Island, going over.
Q. That is, the stern of the Hawley.
A. That is the stern of the head vessel.
Q. You mean to say her stern did come within as near as 125 feet of Blackwell's Island?
A. Yes, sir.
Q. After the Mary Evily passed the stern of the Hawley, how long did she continue on towards Blackwell's Island?
A. Well, I should say about three or four minutes; in fact they were in the act, after they passed the stern of her, of fetching her around.
Q. Did she tack immediately?
A. She ran, say, about four minutes; she ran all of 25 feet, anywhere, somewhere around there.
Q. Did you notice when the Mary Evily commenced going about?
A. I noticed when she came astern; yes, sir, I noticed that.
Q. Where was she then, with reference to the Hawley, when she commenced going about?
A. She was up the river a little.
Q. Was she under the stern of the Hawley?

59 A. She was behind the Hawley; her stern come right behind.

Q. Was she close under her stern?

A. Yes, sir, pretty close; I said about 20 feet, that is the time that she commenced to go about.

Q. At that time, when the Mary Evily commenced going about, how far was she from Blackwell's Island?

A. The last schooner?

Q. Yes.

A. She was about 125 feet from Blackwell's Island.

Q. At that time how far was the sloop from the Island; had she varied her distance?

A. About 75 feet from the island at that time.

Q. Did the Mary Evily come any nearer to the island than those 125 feet when she tacked?

A. Well, yes; she must have ran about 25 feet after she tacked, enough to make it about 100 feet from the island.

Q. While tacking, you say she was about 100 feet from the island when she commenced to tack.

A. 125; in going around she ran in that much closer.

Q. How near did the Mary Evily go to Blackwell's Island, the nearest she went?

A. At the time of the collision she ran right straight in, say about 75 feet from the island; she must have ran that to have ran into the sloop.

Q. How was the Mary Evily heading, with reference to the island, at the time struck the sloop?

A. She was heading across and down about that direction on the island, and down the river, that was the time they came together.

60 Q. You saw her strike the schooner?

A. Yes, sir.

Q. Did you see what side of the sloop's mast her bowsprit and jib-boom went?

A. It went in through the sails, the island side of the mast, between the rigging, and right in through the sails, and tore the sail all up, and the schooner went down.

Q. (By the COURT.) What sail?

A. The mainsail; the only sail that was on the sloop. The sail belonging to the sloop; it went right through it.

Q. Did you see the sloop all the time after the Hawley went about?

A. Yes, sir.

Q. Did you observe whether the sloop made any change in her course?

A. I didn't take notice of them making any change.

Q. Did she make any change?

A. No. She was close on the island all the time.

Q. Did she luff?

A. What do you mean by luff?

Q. Draw off towards the Long Island shore.

A. No, sir.

Q. Did you notice anybody at the helm of the sloop?

A. I noticed the man that was steering her.

Q. Did you see whether he left his helm—left the place where he was steering?

A. No, sir.

Q. You mean to say he did not leave it, or you did not notice.

A. Well, he didn't leave it.

61 Q. You are not acquainted with the movements of vessels, are you?

A. No, sir.
Q. Won't you state exactly where this collision occurred?
A. Opposite the workhouse the collision occurred.
Q. (By Mr. BEEBE.) How near is that to the Lunatic Dock?
A. There are two docks and the lunatic asylum.
Q. The lower dock?
A. Well, I could not judge the distance, say about 200 feet from the dock to the workhouse, and it was right about between the Retreat and the workhouse.
Q. (By the COURT.) Below what dock?
A. Below the coal-dock.
Q. (By Mr. HUNTLEY.) Have you ever observed how far vessels, in heading through there, stand in?
(Objected to; objection sustained.)

Cross-ex'd by Mr. Beebe:

Q. You never followed the water?
A. Yes; I have been on the water about 2 years, up and down that island, but I am no sailor.
Q. Don't you have a crew to row for you?
A. Yes, sir.
Q. You were the guard, or keeper?
A. Yes, sir.
Q. You have no particular interest in either of those vessels, have you?
A. No; not a bit.
Q. Neither of the three?
A. No; it don't interest me a bit.
Q. When did you think there was going to be a collision?
62 A. When the Hawley was going round I expected the Hawley was going to run in.
Q. Then you thought there was going to be a collision?
A. Yes, sir; that was the first that drew my attention. At the time the head schooner came over towards the island the sloop was very close, and I was looking at the sloop keeping so close to the island, and the wind was then blowing up the river, with a heavy running down, and the Hawley came along and came pretty close to her, and I said, "I guess there will be a collision," and I never thought of the other one running into her until I seen her running up into her stem, and I pulled right about and looked at the collision. That is as how I came to notice it at all.

By the Court:

Q. Whereabouts were you in your boat in the river when you first began to think the Hawley would strike?
A. About 50 feet from them, and about 20 feet out from Blackwell's Island shore.
Q. Which way did the Hawley pass you?
A. Down towards New York.
Q. About 50 feet down?
A. Yes; and the tide was running down.
Q. Before the collision; when they tacked across, they came across you within 50 feet?
A. Yes, sir.
Q. And about 25 feet further out from the shore?
A. Yes, sir.

Q. You saw the two vessels when they struck?
A. Yes, sir.
Q. How did they come together—head and head?
63 A. (Illustrating.) Here is the sloop coming right along the island, and here is the vessel that ran into her this way, and when she struck she struck about that way, at about an angle of 45 degrees right across her bows, so that you could cut her right across.

By Mr. Beebe:

Q. Which way was she angling—forward or aft?
A. She was a kind of cross-ways; she didn't run straight into her.
Q. She was swinging on her tack?
A. She was not swinging much; she just about started to swing.
Q. Could you perceive that she had swung at all?
A. She swung a little, but not much.

By the Court:

Q. Had her sails got filled when she struck the sloop? Had her sails stopped shaking?
A. No; she struck just about that way.
Q. You know when sails are shaking?
A. Yes, sir.
Q. Were the schooner's sails shaking, or not?
A. I didn't hardly notice that. I could not notice that, whether her sails were shaking or not.

64 WILLIAM S. WIGGINS sworn on behalf of respondent.

Ex'd by Mr. Huntley:

Q. What were you in September last?
A. Mate of the Ethan Allen.
Q. Were you on board of her at the time of this collision?
A. Yes, sir.
Q. I will come right down to the last tack the schooner made on the Long Island shore to stand towards Blackwell's Island. Did you see them make that tack?
A. I seen the head schooner.
Q. You call her—the Hawley?
A. Yes, sir.
Q. Did you see the other schooner tack?
A. Not on that tack.
Q. Why didn't you see her?
A. She was behind the Hawley.
Q. Had you seen her before?
A. Yes, sir.
Q. How far did the Hawley stand across the river—how near Blackwell's Island?
A. Within 150 feet, I should think.
Q. And then she commenced doing what?
A. Commenced to go about.
Q. While going about how near did she come to the Ethan Allen?
A. 40 or 50 feet, I should think.
Q. When she was from 40 to 50 feet from the Ethan Allen, how did she bear from the Allen?
A. She bore opposite from us, very near.
65 Q. Do you mean to say she was off your beam?
A. Yes, sir; right off there.

Q. At that time, while she was some 40 or 50 feet from you, and off opposite you, where was the other vessel, the Mary Evily?

A. The first I saw of her, she came around the stern.

Q. How near was she to you when you first saw her?

A. She was up the river, about 200 feet, I should think.

Q. And was heading how?

A. Towards Blackwell's Island, a little down the stream.

Q. What did you see her do?

A. Commence to go about—commence to luff.

Q. How far was she from Blackwell's Island when she commenced to luff?

A. Well, about the same as the Hawley was, 150 feet I should think.

Q. Was she, at that time, close on the wind, or was she off it?

A. She was off the wind a little.

Q. As she commenced luffing, what did you do, if anything, on board of your vessel?

A. We didn't do anything; we kept on our course.

Q. How far were you, at that time, from Blackwell's Island?

A. About 75 feet, I should think.

Q. Was there an eddy there?

A. There was an eddy inshore; we were about on the edge of it, I should think.

Q. You saw the Mary Evily commence to luff when she was about 150 feet from Blackwell's Island?

A. Yes, sir.

66 Q. What did she then do?

A. She kept on luffing. That was all that I seen.

Q. Until when?

A. Until she struck us.

Q. Where did she strike you?

A. On the starboard bow.

Q. At the time she struck you, had her sails commenced shaking in the wind?

A. No, sir; I don't think they had.

Q. Then she was still luffing?

A. Yes, sir.

Q. She struck you on your starboard bow. On which side of your mast did her bowsprit and jib-boom go?

A. Her jib-boom went on the port side.

Q. On the Blackwell's Island side?

A. Yes, sir.

Q. Between the mast anything else?

A. And the rigging.

Q. Did it come in contact with your sail?

A. Yes, sir; it went through the mainsail.

Q. It could not have touched that side if it had gone on the other side, could it?

A. No, sir.

Q. You saw the Mary Evily come out under the stern of the Hawley while you were standing on board of your vessel?

A. In the starboard quarter.

Q. How far from the captain?

A. So that I could touch him, very near.

Q. And he was at the helm, was he?

67 A. Yes, sir.

Q. Did you observe the course of your vessel during that time; that is, whether she went straight, or to the right or left?

A. She went as straight as she could go on her course, keeping her course right along.

Q. Did she luff?

A. No, sir.

Q. Are you positive of that?

A. Yes, sir.

Q. Could you have done anything, and if so, what, to have avoided the collision with the Mary Evily after she came around under the stern of the Hawley?

A. I could not have done anything then—not to keep clear of her.

Q. If you had kept off what would have been the effect?

A. She would have struck us in a worse place—amidships.

Q. Suppose you had luffed?

A. She would have come into her anyway, then.

Q. Where would she have struck you if you had luffed?

A. She would have struck us head on, somewhere.

Q. How deep in the water was your vessel?

A. A little over seven feet.

Q. Was the water close up to her deck?

A. Yes, sir; loaded very deep.

Q. How far were your bulwarks above the deck?

Not answered.

Q. Did the captain leave the helm at any time while going up the island?

68 A. He left when she struck—not before.

Q. Had the collision actually taken place when he left?

A. Yes, sir; it hit us.

Q. How long have you followed the water?

A. Ten years since I first commenced.

Q. Are you familiar with navigation through Hell-Gate?

A. Yes, sir.

Q. In your opinion was there room for the Mary Evily to have gone about at the time the Hawley did?

A. Yes, sir; the other side of her I should think.

Q. Between her and the Long Island shore?

A. Yes, sir.

Q. Will you state what, in your opinion, the Mary Evily should have done to have avoided that collision?

A. She should have went about when the Hawley did if she could.

Q. Could she have done it?

A. I don't know whether she could or not.

Q. Was there room for her to do it?

A. Yes, sir.

Q. Why do you say you don't know whether she could or not have done it?

A. I don't know how near she was. There was plenty of river there, outside of her, for any vessel to work.

(It is admitted by the respective counsel that the carrying capacity of the Mary Evily was 120 tons of coal, and that the Hawley was about the same size, but rather a larger vessel.)

69 Cross-ex'd by Mr. Beebe:

Q. How far were those vessels off when you first saw them?

A. They were up the river when they tacked towards the Long Island shore.

Q. Half a mile, or three quarters?

A. I don't know.
Q. Can you form any judgment how far they were off?
A. No, sir; I know they were on the tack towards Long Island.
Q. You observed, at any rate, that they were tacking on the wind?
A. Yes, sir.
Q. Beating about?
A. Yes, sir.
Q. After the Hawley tacked on the Long Island shore, you didn't see the Mary Evily until she came out under the Hawley's stern?
A. I didn't take any notice of her.
Q. At all?
A. No, sir.
Q. How wide do you think the river is there?
A. Six or 700 feet, I suppose.
Q. How long have you been navigating Hell-Gate?
A. Ever since I commenced to go on the water.
Q. Did you come to anchor that day at all?
A. No, sir.
Q. Is there a cove off at Hunter's Point?
A. Yes, sir; flats there, where they anchor.
Q. Is there a place there where vessels anchor?
A. Yes, sir.
70 Q. In an ebb tide?
A. Yes, sir; or any other tide.
Q. Vessels bound east, is that not a common place for them to anchor in an ebb tide?
A. Yes, sir.
Q. With the wind as it was that day, and the tide running strong ebb, did you ever undertake to sail a vessel through there before?
A. Yes, sir; I have stemmed the tide up.
Q. How many times, in the course of your experience, do you suppose you have done that?
A. I could not tell—several times through.
Q. In the course of ten years?
A. Yes, sir.
Q. Could you say half a dozen?
A. Yes, sir.
Q. More than that?
A. I should think so.
Q. Can you say it was more than that in 10 years that you attempted to stem the tide through on the first ebb of the tide?
A. We don't very often go through on it.
Q. It is not usual?
A. No, sir.
Q. You generally come to an anchor there?
A. If we think we cannot stem it.
Q. When you spoke about there being 75 feet off the shore, you took that measurement by your eye?
A. Yes, sir.
Q. And you speak from the inside of the vessel and the shore, don't you?
A. Yes, sir.
71 Q. And she was about 20 to 2 feet wide?
A. I don't know how wide she is.
Q. Did you form any judgment how wide she was?
A. I suppose she was somewhere in that neighborhood.

Q. At any rate no attempt was made on the part of the sloop to avoid the collision in any way?

A. She kept on her course.

Q. That is the only thing she did do?

A. Yes, sir.

Q. From the first time you saw the vessels until the time the Mary Evily came in contact with you no effort was made to avoid it, except to keep on your course?

A. That is all. We kept on our course.

Q. About how strong a breeze did you have, do you think?

A. We had a good whole-sail breeze.

Q. How many knotts do you think?

A. Seven or 8 knotts, I suppose.

Redirect:

Q. Was your peak settled?

A. A little.

Q. State why you don't go through on an ebb-tide sometimes?

A. I can go through if you stem it.

Q. Do you ever fail to go through when there is wind enough to stem the tide?

A. No, sir.

Q. Don't vessels always go through when they have wind enough?

A. They don't always—them that undertake it.

Q. Vessels that can stem it go through?

72 A. Yes, sir.

Q. (By Mr. Beebe.) Would you have advised to have attempted to stem the strength of the ebb-tide going through there, with the risk of vessels beating down?

A. I don't know whether I would or not.

By Mr. Huntley:

Q. Explain what you mean by saying you don't know whether you would advise the risk of stemming there?

A. I would just as *leave* run the risk if I could stem it.

Q. The question is whether you can stem it?

A. Yes, sir; if I can stem the tide, it is all right.

Q. Do you understand there is any other risk besides stemming it—is that the only risk?

A. That is all that I know of.

JOHN HENDERSON sworn on behalf of respondent:

Ex'd by Mr. Huntley:

Q. What were you doing in September last?

A. I was steward on board the Ethan Allen.

Q. Were you on board of her at the time of this collision?

A. Yes, sir.

Q. Who was at the helm of your vessel on this occasion?

A. Captain Merrill.

Q. Did he leave it and help at any time?

A. No, sir; only the time they came together.

Q. Did they strike before he left the helm, or did he leave before they struck?

A. He left the helm after they struck.

Q. You saw the collision, did you?

A. Yes, sir.

73 Q. Did you notice on which side of your mast the jib-boom and bowsprit of the schooner went?
A. Yes, sir.
Q. On which side was it?
A. They went on the port side.
Q. Between the mast and anything else?
A. Between the mast and the rigging.
Q. Did it come in contact with your mainsail?
A. Yes, sir.
Q. What effect did produce?
A. They flying-jib-boom went through it.
Q. Tore it?
A. Yes, sir.
Q. How far were you from Blackwell's Island shore at that time, in your judgment?
A. I should judge about 60 to 70 feet.
Q. Did you notice the Mary Evily when she came out from under the stern of the Hawley?
A. No, sir; I did not.
Q. When did you first see her?
A. I didn't see her, not until she was making the last tack on to Blackwell's Island.
Q. I mean, before the collision, did you see her then?
A. No, sir; I did not.
Q. When did you last discover before the collision?
A. The last I discovered her was just a moment before she struck us.
Q. Where were you stationed?
A. I was stationed on the quarter.
Q. Did you observe whether or not your vessel came at her force?
A. No, sir; she did not.
74 Q. You observed that she did not?
A. Yes, sir.
Q. Can you say positively that she did not?
A. Yes, sir.

Cross-ex'd by Mr. Beebe:

Q. Did she yaw?
A. I don't know whether she yawed. It is natural a vessel will yaw a little going a little, stemming the tide.
Q. Did you observe whether she did or not?
A. I did not observe. I am not certain.
Q. Were you doing any duty?
A. No, sir.
Q. Had you had your dinner?
A. Yes, sir.
Q. How long have you followed the water?
A. This will make my second season?
Q. Did you have any talk with the captain about coming to anchor?
A. No, sir.
Q. Didn't you tell the captain you thought he ought to come to anchor there until the ebb-tide had passed?
A. No, sir; I never said anything to him about it.
Q. Did you think it?
A. I thought something of it, and I thought likely he would.
Q. You thought he would come to anchor there?

A. Yes, sir.

Q. While you have been going up and down the date that has been the usual way?

A. In an ebb tide when the ebb is strong.

75 A. Yes, sir.

Q. So, off the shore, you observed you were running pretty close along the shore?

A. Yes, sir.

Q. Did you think the number of feet in your mind at all, or is it a suggestion since?

A. Just what I thought.

Q. That you were running along between 60 and 70 feet of the shore?

A. Yes, sir.

Q. Do you know how long your boom was?

A. No, sir.

Q. Was your boom off square, or trimmed in some?

A. It was off square.

Q. It was not trimmed in a couple of points?

A. Not that I noticed.

Q. Can you say whether it was or not, anything?

A. No, sir; I cannot.

Q. You didn't pay any attention to the steering either, did you?

A. Of course I could not help but pay attention to the steering.

Q. Did you watch the captain at the wheel to see what he did?

A. No, sir; I did not.

Q. Were you standing up or sitting down?

A. I was standing up.

Q. On the starboard side?

A. On the starboard side.

Q. How far forward of the wheel?

A. I was right opposite the wheel.

Q. On the starboard side?

76 A. Yes, sir.

Q. Looking ahead?

A. Looking ahead.

Q. The first you observed of the Mary Evily was when you were close together?

A. Yes, sir.

Redirect:

Q. How long had you followed the water at that time?

A. I guess 5 or 6 months, nearly.

Q. Why do you expect a vessel to anchor on the ebb-tide in that cove?

A. It is according to circumstances when they anchor—if they have got good wind to run the stem of the tide by.

Q. Do you expect them to anchor if they are bound into the sound?

A. No, sir; not if they have the wind to stem the tide.

Q. The only reason they anchor is because the tide runs so swift, and sometimes prevents their getting through?

A. Sometimes they anchor. If they have got the wind to stem the tide, they go on, and if not, they will anchor until the tide turns.

Recross:

Q. Hard to handle a vessel, under such circumstances, where there is a strong tide against them?

A. I suppose it is. I never had much occasion to try.
Q. (By Mr. Huntley.) You were steward, I understood you to say?
A. Yes, sir.

77 HENRY B. MERRILL recalled on behalf of respondent.

Ex'd by Mr. Huntley:

Q. What is the usage as to a vessel bound east, through the sound, going through Hell-Gate on an ebb-tide?
A. We get loaded and leave New York, or any port, for the south, and start out with the wind strong enough to stem the tide, and keep our vessel going.
Q. Do you ever stop, if there is wind to carry you through, so that you can stem the tide?
A. No, sir.
Q. It is not the usage to stop?
A. No, sir.

Cross-ex'd by Mr. Beebe:

Q. You take it on the first of the ebb, and from that for about two hours' ebb. Is there not generally a fleet of vessels that come down from the south?
A. At that time there were 5 or 6 vessels passed me at the south end of Blackwell's Island. All passed me on the starboard side.
Q. I want to know if it is not a usual thing that on the first of the ebb, and so for about 2 hours' ebb, during the strength of it, that there is that channel generally more vessels coming towards New York than at any other time?
A. Generally.
Q. Don't they usually come to anchor about Riker's Island, if they have not the tide right?
A. Not if they have the wind to stem through.
Q. Don't they usually?
A. Not if they have the wind to stem through.

78 Q. Are there not a greater number of vessels coming through there, bound west, with an ebb-tide, than with the flood?
A. Yes, sir; because they cannot get through.
Q. It is more crowded, to', is it not, with vessels bound towards New York on an ebb-tide—the strength of the ebb?
A. If vessels are waiting at Blackwell's Island, they start on the first of the tide.
Q. It is usually more crowded?
A. There are generally more vessels. I don't understand about its being crowded.
Q. When did you go through the last before this on an ebb-tide?
A. I could not tell you.
Q. Can you tell me whether you have ever went through there since on an ebb?
A. Yes, sir.
Q. I mean bound for New York?
A. I don't call to memory, now, any particular time.
Q. Can you name any particular time except this last occasion, within the last two years, that you have done it?
A. Yes, sir.
Q. How long ago?
A. This spring.
Q. You have done it this spring?

A. Yes, sir.
Q. Any other occasion?
A. I don't remember of any.
Q. Was the tide on the strength of the ebb then?
79 A. Yes sir.
Q. Where was the wind?
A. The wind was to the westward.
Q. Can you remember any other occasion?
A. I do not.
There is one thing I would like to state, speaking about the vessel stemming through Hell-Gate. Last season, at one particular time, there were 30 vessels came into Hell-Gate with the wind east and a flood-tide.

JOHN W. PETTY recalled on behalf of libellant.

Ex'd by Mr. Beebe:

Q. Is there any eddy in the ebb-tide along Blackwell's Island shore—anything more than slackwater?
A. No, sir; there is no place that I know.
Q. A little less tide?
A. Yes, sir.
Q. How long have you been in the habit of going through there?
A. I have been through there, off and on, for 30 years.
Q. With no vessel being in your way, how close to Blackwell's Island do you run on an ebb-tide, coming down?
A. It is not uncommon for me to tack within 20 feet of the shore, that is to clear, when I am going around.
Testimony closed.

80 EASTERN DISTRICT OF NEW YORK, *ss:*

I, Samuel T. Jones, clerk of the district court of the United States for the eastern district of New York, do hereby certify that the two causes above entitled were tried before his honor, Judge Benedict, and that the minutes of testimony therein were taken in part by the said judge and the balance by a stenographer. That the foregoing is a true copy of the original minutes of testimony taken as aforesaid on the trial of said causes.

Witness my hand and the said court at Brooklyn, this 21st March, A. D. 1870.

SAMUEL T. JONES, *Clerk.*

81 UNITED STATES OF AMERICA,
Southern District of New York,
City, County, and State of New York, ss:

Be it remembered, that on this fifth day of February, in the year of our Lord one thousand eight hundred and sixty-nine, I, George F. Betts, a commissioner duly appointed by the circuit court of the United States for the southern district of New York, in the second circuit, under and by virtue of the acts of Congress, entitled "An act for the more convenient taking of affidavits and bail in civil causes, depending in the courts of the United States," passed February 20th, 1812, and the act of Congress entitled "An act in addition to an act entitled 'An act for the more convenient taking of affidavits and bail in civil causes, depending in the courts of the United States,'" passed March 1st, 1817, and an act entitled "An act to establish the judicial courts of the

United States," passed September 24th, 1789, did call and cause to be and personally appear before me, at my office, at 41 Chambers street, in the city of New York, in the said southern district of New York, in the State aforesaid, Charles Bennett, to testify and the truth to say, on the part and behalf of the libellants, in a certain suit or matter of controversy, now depending and undetermined in the district court of the United States for the southern district of New York, at New York, wherein Henry B. Merrill & als. are libellants against the schooner Mary Eveline, her tackle, &c. And the said Charles Bennett, being about the age of 40 years, and having been by me first cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, in the matter of controversy aforesaid, I did carefully examine the said Charles Bennett, and he did thereupon depose, testify, and say as follows, viz:

I live at Sag Harbor. I am a seafaring man engaged in coasting business; expect to go to sea March 1st. Sag Harbor is more than 100 miles distant from the southern district of New York. In September last I was master of the schooner Charles Hawley. I witnessed a collision on the 20th September, 1868, between the sloop Ethan Allen & the schooner Mary Eveline, betwixt Blackwell's Island and Long Island, 2 to 3 o'clock p. m.; we were bound to the westward; the wind was a head to us; we were tacking across the river from one side to the other; the tide was ebb, running strong—about two hours' ebb. The Mary Eveline was in company with us. She was also beating down—within hailing distance most of the time. For two tacks the Mary Eveline had been so near to us that she went around our stern to tack when we were in stays. When we were standing over from Long Island towards Blackwell's Island, we were both on one tack, the Mary Eveline a little to windward of
82 us, but almost in a line astern of us, and about four of our lengths distant from us—that is, about 450 feet. At that time the Ethan Allen was coming close along by Blackwell's Island, running about northeast with a fair wind, parallel with the Blackwell's Island shore, and about 75 feet off from that shore; her boom was off her port side. I tacked at about 170 feet off from Blackwell's Island to go towards Long Island, and at that time, when I came into the wind, was a little distance ahead of us, and a little inshore of us, and probably 300 feet west or southwest of a line from us to Blackwell's Island. The Mary Eveline then kept off to go round our stern. When she was abreast of our stern the Ethan Allen had lapped on to our bow. The Captain of the Mary Eveline put his helm down to go about, then the collision occurred. As the Mary Eveline was in the act of going about, the bow of the Mary Eveline struck the sloop about half way of its bowsprit, and the headgear of the Mary Eveline went in between the mast and the lee-rigging of the sloop. At the time of our tacking the sloop was 75 feet distant from Blackwell's Island; she did not change her course after that. When I first discovered the Ethan Allen I was off the east point of Blackwell's Island, half a mile from the sloop. I made one tack from Blackwell's Island to Long Island, and another from Long Island to Blackwell's after that, before the collision. During all this time the Mary Eveline was following us, tack and tack. There were no other vessels in that vicinity. The tide close under the Blackwell's Island shore is weaker than further out in the river.

Q. What is the usual and proper course and position for vessels to take when going east with a fair wind against a strong ebb-tide?

(Obj. to.)

A. It is their place to keep out of the strong tide as much as possi-

ble. To do that she would go under the shore, where the tide is not so strong.

83 Q. When the Mary Eveline, at the time of your last tack before the collision, went around your stern and luffed up, how far was she from the Ethan Allen?

A. They were together. The Mary Eveline was in the act of turning to the windward. They came together as the Mary Eveline was in the act of turning. The Ethan Allen did not change her course clear down to the time of the collision.

Q. Could the Ethan Allen have done anything then to avoid the collision?

A. I don't think she could, (obj. to,) in the position the vessels were in.

Q. Suppose the Ethan Allen had luffed, what would have been the effect?

A. The Mary Eveline would have hit her, because she was in the act of turning, which cut the sloop off from luffing.

Q. Suppose the sloop had kept away?

A. It would have made it worse, because the sloop would expose its broadside and they would be coming together. The Mary Eveline wanted all the room there was there to turn around in.

Q. Under the circumstances, what should the Mary Eveline have done?

A. She ought to have gone about when I went about. In that case there would not have been any collision. During all the time after I saw the Ethan Allen she and the Mary Eveline were in sight of each other. I had beaten out my tack at the time I last went about.

Q. State whether it is usual for vessels, in beating down that river, as you then were, to stand nearer the Blackwell's Island shore than from 150 to 200 feet.

(Obj. to.)

84 A. No, sir; it is not usual. The effect of this collision was, that the sloop sunk in 5 to 6 minutes, in about 5 fathom' of water.

Cross-examined by Mr. Wilcox:

It was 75 feet from the point of collision to the Blackwell's Island shore. I should call the river there a quarter of a mile wide. I think the river is 5 to 6 fathoms deep there. The water is deep close to the Blackwell's Island shore; the shore is bold. I stood within 100 to 150 feet of the Long Island shore in running my tacks. The Blackwell's Island shore is the boldest. The water on the Long Island shore is deep. In tacking down the Mary Eveline had been following the Hawley closely on all her tacks. I should judge the Mary Eveline was 150 feet long from the end of her flying-jib boom over all.

Q. If the Ethan Allen had kept off at the time the Mary Eveline commenced her tack, would the collision have been avoided?

A. No, sir; she was within 75 feet of the island, and could not have gone through that.

Q. Supppose she had taken the other *cause*?

A. Then we should have hit her on the other tack; I mean on our other tack.

Q. Was there room for the Mary Eveline, after passing round your stern, to have gone between the sloop and the Blackwell's Island shore?

A. There was not room the way they worked for her to pass.

85 If the captain had given the Mary Eveline a longer sweep, so as to fetch her head to the wind along the island, I think he could

have done it, but it would have been close. The Mary Eveline was in the act of going about as she passed our stern, and we were just filling away. She went about as soon as she could after passing our stern. The Ethan Allen sunk in the middle of the river, about ⅛ of a mile from the point of collision. I saw Captain Merrill next day. We had some talk about this collision.

Q. Did he not say that the Mary Eveline could have gone between the Ethan Allen and the Blackwell's Island shore?

A. He said he did not think there was room.

Q. Was there any other course the Mary Eveline could have taken than to attempt passing around your stern and tacking as she did?

A. She should have tacked when the Hawley did.

Redirect:

I have followed the water 24 years, and for 20 years have been familiar with the navigation of the East River.

CHARLES R. BENNETT.

Subscribed and sworn to this 5th day of February, 1869, before me.

GEO. F. BETTS,
U. S. Commissioner.

86

87 UNITED STATES OF AMERICA,
Southern District of New York, City, County, and State of New York, ss:

Be it remembered that on this fifth day of February, in the year of our Lord one thousand eight hundred and seventy- , I, George F. Betts, a commissioner duly appointed by the circuit court of the United States for the southern district of New York, in the second circuit, under and by virtue of the acts of Congress, entitled "An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States," passed February 20th, 1812, and the act of Congress entitled "An act in addition to an act entitled, 'An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States,'" passed March 1st, 1817, and an act entitled "An act to establish the judicial courts of the United States," passed September 24th, 1789, did call and cause to be and personally appear before me at my office at 41 Chambers street, in the city of New York, in the said southern district of New York, in the State aforesaid, John M. Andrews, to testify and the truth to say, on the part and behalf of the libellants, in a certain suit or matter of controversy, now depending and undetermined in the district court of the United States for the southern district of New York, at New York, wherein Henry B. Merrill & als. are libellants against the schooner Mary Eveline, her tackle, &c.

And the said John M. Andrews being about the age of 36 years, and having been, by me first cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, in the matter of controversy aforesaid, I did carefully examine the said John M. Andrews, and he did thereupon depose, testify, and say as follows, viz:

I live at Sag Harbor, more than 100 miles from the southern district of New York. I am a seafaring man; expect to go to sea in March; in September last I was acting as first hand on the schooner Charles Hawley; I saw this collision; it occurred in the East River; our ves-

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el was bound towards New York; we had a head wind and ebb-tide; I saw the Mary Eveline all along as we came up; she came through the Gate to leaward of us, and gained on us fast. I first saw the sloop Ethan Allen when we were very near Mill Rock—after we hauled in around Hallett's Point; then the whole river was open the whole length of Blackwell's Island; I should judge the sloop was about ⅓ of the way up the island when I first saw her, on the west side of the river, close under Blackwell's Island, in the east channel. I judge she was 70 to 75 feet from Blackwell's Island. We continued beating on
88 down; when we tacked last on the Long Island shore the Mary Eveline was close to us, and kept away a little to clear our stern; after we had tacked she came around nearly astern of us—a very little under our lee; we then stood on, made our tack out, and then we came about. We came to about 140 or 150 feet of Blackwell's Island; we stood our tack out; the Ethan Allan was then close in under Blackwell's Island, coming up before the wind, about 300 feet off from us when we tacked; when we had filled away she was not over 200 feet down the river from us; she was then 70 to 75 feet off the Blackwell's Island shore; the tide was then sagging her down to us very fast. When we tacked at Blackwell's Island the Mary Eveline kept off across our stern, and as soon as she went past our stern I saw her captain let go the wheel and let the vessel come around, & she continued luffing and luffed right into the Ethan Allen, struck her on the bluff of the starboard bow abreast, (as near as I could judge,) of the starboard cat-head of the sloop. The Mary Eveline struck head on. At that time I should say the sloop was not over 75 feet from Blackwell's Island shore, at the outside.

Q. Could the Ethan Allen have done anything to avoid the collision?

A. I don't see how he could have gone to work to have done it—not in the position he was placed in.

Q. Could the Mary Eveline have avoided the collision?

A. I don't see how, under the circumstances in which she was placed.

Q. As they were placed, when do you mean?

A. After the Mary Eveline had crossed our stern.

Q. Before that could the Mary Eveline have done anything to avoid the collision?

A. I think she could.

Q. What could she have done?

A. Gone about when the Charles Hawley did.

89 Q. Was there anything to prevent her going about when the Hawley did?

A. No, sir; I don't think there was—nothing that I could see.

Q. After the Mary Eveline passed the Hawley's stern, did the Ethan Allen change her course?

A. No, sir. If she did it was so little that was not perceivable.

Q. If the Ethan Allen had kept away, what would have been the effect?

A. She would have exposed her broadside to the head of the Mary Eveline, and have sunk a great deal quicker than she did.

Q. If the Ethan Allen had luffed what would have been the effect?

A. I don't see that it could have bettered it any. She would have struck her more head on, or on the other bow.

I have been acquainted with the navigation of the East River 6 or 7 years. Have been master 4 years. When the tide is running ebb it is a great deal slacker close inshore than out in the river.

Cross-examined by Mr. Wilcox:

The jib-boom of the Mary Eveline ran in between the mast and the lee rigging of the sloop. The tide just caught them, the sloop's mainsail being still up, and drifted them out into the middle of the river where the sloop went down head first, its rigging hanging by the schooner's jib-boom.

Q. Was there room enough for the Ethan Allen to have gone a few feet nearer to Blackwell's Island, and thus to have avoided the collision?

90 A. I should not think there was. He was running about as nigh the land as was safe.

Q. About what change of the Ethan Allen would have avoided the collision at that time?

A. I couldn't see any that would have, under the circumstances.

Q. Before the time of the collision could the Ethan Allen have so changed her course as to have avoided the collision?

A. What time do you mean?

Q. I mean before the Mary Eveline put her helm down?

A. No, sir. When the Mary Eveline was under our stern, the Ethan Allen was going about three (3) knots past the land; she had her mainsail set; main sheet off full length; boom off port side; with her main peak slacked a little; her main topsail was clewed up and hanging.

I couldn't tell whether any effort was made or not on the sloop to avoid the collision. I don't see how they could do anything.

I saw three on board the sloop on the quarter-deck just previous to the collision, the captain at the helm. He remained at the helm till she struck.

Redirect:

The Mary Eveline was under her 3 sails—jib, foresail, & mainsail. I thought she worked very well in her tacks. The wind was about a six-knot breeze—a good working breeze.

Re-cross:

I could'nt swear whether the mainsail on the Mary Eveline was reefed or not. I don't think it was.

91 JOHN M. ANDREWS.

Subscribed and sworn to this 5th day of February, 1869, before me.

GEO. F. BETTS,
U. S. Comm'r.

(Here follows the commissioner's certificate.)

92 (Endorsed:) United States dist. court for the southern district of New York. Henry B. Merrill & als. vs. The schooner Mary Eveline, &c. Depositions on the part of the libellants taken before Geo. F. Betts, United States Commissioner, on the 5th day of February, 1869. Filed Feb. 5, 1869.

93 At a stated term of the district court of the United States of America for the southern district of New York, in the second circuit, held at the United States court-rooms, in the city of New York, on Wednesday, the twentieth day of October, in the year of our Lord one thousand eight hundred and sixty-nine.

Present the Honorable Charles L. Benedict, dist. judge.

HENRY B. MERRILL & AL.
vs.
THE SCHOONER MARY EVELINE, HER TACKLE, &C., } 22. 401.

This case having been heard on the pleadings and proofs, and argued

and submitted by the advocates for the respective parties, and due deliberation being had in the premises:

It is now ordered, adjudged, and decreed by the court, that the libel filed in this action be and the same is hereby dismissed with costs to be taxed against the libellants.

And it is further ordered that unless an appeal be taken from this decree within the time limited and prescribed by the rules and practice of this court, the stipulators for libellants' costs pay into the registry of the court the amount of their stipulation, & that the clerk distribute the proceeds in satisfaction of the taxed costs.

CHA'S L. BENEDICT.

94 (Indorsed:) Vol. 22, No. 401. U. S. dist. court S. D. of New York. Henry B. Merrill et al. vs. The schooner Mary Eveline, her tackle, &c. R. H. Huntley, p'r lib't. F. A. Wilcox, proctor for cl'ts. Final decree. Libel dismissed with costs. Filed the 20th day of October, 1869.

95 U. S. district court, southern district of New York.

HENRY B. MERRILL ET AL. LIBELLANTS,
vs.
THE SCHOONER MARY EVELINE, HER TACKLE &c., respondent. } 22401.

GENTLEMEN: You will please take notice that the libellants appeal from the final decree and every part thereof entered in the above-entitled cause, to the next term of the circuit court of the United States for the southern district of New York.

Yours, &c.,

R. H. HUNTLEY,
Proctor for Libellants.

To GEORGE F. BETTS, esq., *Clerk, and*
F. A. WILCOX, esq.,
Proctor for Claimants.

(Endorsed:) 22. 401. U. S. district court south'rn dist. of New York. Henry B. Merrill, et al. lib'ts, vs. The Sch'r Mary Eveline, her tackle, &c., resp'd't. Notice of appeal to circuit court. To Geo. F. Betts, esq., clerk. R. H. Huntley, proctor for l'b'ts. Filed Oct. 29, 1869.

96

97 Circuit court of the United States of America for the southern district of New York, in the second circuit.

HENRY B. MERRILL ET AL. LIBELLANTS & APpellants,
vs.
THE SCHOONER MARY EVELINE, HER TACKLE, &c., John W. Petty and Isaac Homan, claimants and appellees. } Bond for costs on appeal.

Know all men by these presents, that we, Henry B. Merrill, for self & others, libellants, by R. H. Huntley, their attorney in fact, and David G. Floyd, are held and firmly bound unto the above-named claimants & appellees in the sum of two hundred & fifty dollars, to be paid to the said claimants, for the payment of which, well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents, sealed with

our seals, and dated the sixth day of November, in the year of our Lord one thousand eight hundred and sixty-nine.

Whereas, the above-named libellants have prosecuted an appeal to the circuit court of the United States, for the southern district of New York, in the second circuit, to reverse the decree rendered in the above-entitled suit, by the judge of the district court of the United States for the southern district of New York:

Now, therefore, the condition of this obligation is such, that if the above-named libellants shall prosecute their appeal to effect, and answer all damages and costs if they fail to make their appeal good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

HENRY B. MERRILL ET AL. [L. S.]
By R. H. HUNTLEY, *Att'y.*
DAVID G. FLOYD. [L. S.]

Sealed and delivered, and taken and acknowledged, this sixth day of November, 1869, before me.

JOHN A. OSBORN,
U. S. Comm'r.

98 UNITED STATES OF AMERICA,
Southern District of New York, ss:

David G. Floyd being duly sworn, doth depose and say that he resides in the eastern district of New York, & that he is worth the sum of five hundred dollars over and above all his just debts and liabilities.

DAVID G. FLOYD.

Sworn to this sixth day of November, A. D. 1869, before me.
JOHN A. OSBORN,
U. S. Comm'r.

Sufficiency of bond approved, Nov'r 6th, 1869.
SAM'L BLATCHFORD, *D. J.*

(Indorsed:) Vol. 22. Page 401. U. S. circuit court. Henry B. Merrill & al. lib'ts & app'l'ts, vs. The schooner Mary Eveline, her tackle, &c. John W. Petty & al. cl't, appellee'. Bond for costs on appeal. R. H. Huntley proctor lib'ts & app'lt's. Filed this sixth day of November, 1869.

99 Circuit court of the United States, southern district of New York

HENRY B. MERRILL, DAVID G. FLOYD, AND Charles Bates for themselves, and Henry S. Ackley as executor *as* the last will and testament of Elisha S. Champion, owners of the sloop "Ethan Allen," and C. Whitehead and W. Whitehead, owners of cargo, libellants and appellants,

against

THE SCHOONER "MARY EVELINE," HER tackle, &c., John W. Petty and Isaac Homan, claimants and appellees.

To the honorable the circuit court of the United States for the southern district of New York, in the second circuit.

The appeal of the above-named appellants respectfully sheweth that

on or about the twenty-third day of December. 1868, the above-named libellants and appellants exhibited their libel in the district court of the United States for the southern district of New York against the schooner "Mary Eveline," praying among other things that the said schooner be adjudged to be sold for the payment of the libellants' demand in said libel, and that she be condemned, for the reasons set forth in said libel, to pay a sum greater than fifty dollars, and each of said libellants in said libel mentioned claiming over fifty dollars, besides costs in said libel mentioned.

100 That under process issued ont of said court, said vessel was attached by the marshal, and that the above-named claimants appeared for her, and did, on the nineteenth day of January, 1869, file their answer to said libel in said district court, praying that said libel be dismissed with their costs in that behalf, as by reference to said libel and said answer will more fully appear. That the said cause came on to be heard before the Honorable Charles L. Benedict, on or about the 21st, 22nd, 23rd, 26th, and 27th days of April, 1869; and on or about the 17th day of September, 1869, upon the depositions and proofs taken in said cause, and the testimony and proofs adduced by the respective parties, and said judge having advised thereon, on the 20th day of October, 1869, made a decree or sentence in said cause, whereby among other things it was decreed that said libel be dismissed with costs, as by reference to said decree will more fully appear; the said final decree therein being filed and entered on the said 20th day of October, 1869. And the appellants insist that the said decree is erroneous, inasmuch as the libellants are entitled to recover their claim with costs in said suit; and the appellants for these and other reasons appeal from the whole of said decree to the said circuit court to be held in said district, and on said appeal they intend to have said cause heard anew on the pleadings and proofs in the district court and to introduce further proofs. And they pray that the record and proceedings may be returned to said circuit court, and that the said decree and every part thereof may be reversed or such other decree thereon be made as to said circuit court shall

101 seem just, and that the claimants and appellees be condemned to pay the appellants their costs and damages in the premises.

Dated New York, November 5th, 1869.

RICHARD H. HUNTLEY,
Proctor for L'b'l'ts & App'l'ts.

(Endorsed:) 22. 401. Circuit court of the U. S. southern district of N. Y. Henry B. Merrill et al. libellants and app'l'ts, ag'st The Schooner "Mary Eveline," her tackle, &c., John W. Petty & another, cl'ts, appellees. Appeal to U. S. circuit court. R. H. Huntley, proctor for libell'ts & appel'ts. Filed Nov. 6, 1869.

I hereby admit due and timely service of a copy of within appeal to U. S. circ't court.

Dated N. Y., Nov. 6, 1869.

F. A. WILCOX,
Proctor for Cl'ts & Appellees.

To GEO. F. BETTS, esq., *Clerk.*

102

103 U. S. circuit court.

JOHN W. PETTY ET AL.
ag'st
HENRY B. MERRILL ET AL.

It is hereby consented and stipulated that a copy of the depositions of Captains Merrill, Rackett, & Freeman, taken on appeal before U. S. Commissioner E. S. Owen, on the 21st day of September, 1870, in the suit of Henry B. Merrill & al. ag'st the schooner Mary Eveline, her tackle, &c., pending in the southern district, may be read in the above-entitled action in the eastern district, whenever the appeal in the same shall be heard.

And it is hereby further consented and stipulated that the filing of the original depositions be waived, and that they may be retained by the proctor for Henry B. Merrill et al., the libellants, in the southern district.

Dated New York, Sept. 23, 1870.

F. A. WILCOX,
Lib'lts' Proctor.
R. H. HUNTLEY,
Cl'm'ts' Proctor.

(Endorsed:) U. S. circuit court. John W. Petty et al. vs. Henry B. Merrill & al. Stipulation. Filed Sept. 23, 1870.

105 UNITED STATES OF AMERICA,
Southern District of New York,
City, County, and State of New York, ss:

Be it remembered, that on this 21st day of September, in the year of our Lord one thousand eight hundred and seventy, I, Edward L. Owen, a commissioner duly appointed by the circuit court of the United States for the southern district of New York, in the second circuit, under and by virtue of the acts of Congress ıtitled "An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States," passed February 20th, 1812, and the act of Congress entitled "An act in addition to an act entitled 'An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States,'" passed March 1st, 1817, and an act entitled "An act to establish the judicial courts of the United States," passed September 24th, 1789, did call and cause to be and personally appear before me, at my office, at number 71 Wall street, in the city of New York, in the said southern district of New York, in the State aforesaid, Henry B. Merrill, to testify and the truth to say, on the part and behalf of the libellants & appellants, in a certain suit or matter of controversy now depending and undetermined in the circuit court of the United States for the southern district of New York, at New York, wherein Henry B. Merrill, David G. Floyd, Charles Bates, Henry S. Ackley, executors of the last will and testament of Elisha S. Channson, deceased, & als., are libellants, against the schooner "Mary Eveline," her tackle, &c.

And the said Henry B. Merrill having been by me first cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, in the matter of controversy aforesaid, I did carefully examine the said Henry B. Merrill, and he did thereupon depose, testify, and say as follows, viz:

I am 47 years of age. I live at Greenport, Long Island, and am a sea-faring man. I expect to go to sea this afternoon. I have followed the water some thirty-three years, and have been master of a vessel seventeen years, and have been running through Long Island Sound most of the time, and through Hell-Gate.

1. Q. In case of a vessel stemming the tide through Hell-Gate with a fair wind, what position should she take and keep?

(Obj. to.)

A. She should take one side of the passage in order to avail herself of the eddy tide, and in order to keep out of the way of vessels beating down in the true tide.

2. Q. Is there a usage or custom with coasters upon that subject?

(Obj. to.)

A. Yes, sir.

106 3. Q. Have you stated the usage and custom?

(Obj. to, not upon the ground of its being leading, but of its relevancy.)

A. Yes, sir.

HENRY B. MERRILL.

107 UNITED STATES OF AMERICA,
Southern District of New York,
City, County, and State of New York, ss:

Be it remembered, that on this 21st day of September, in the year of our Lord one thousand eight hundred and seventy, I, Edward L. Owen, a commissioner duly appointed by the circuit court of the United States for the southern district of New York, in the second circuit, under and by virtue of the acts of Congress entitled "An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States," passed February 20th, 1812, and the act of Congress entitled "An act in addition to an act entitled 'An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States,'" passed March 1st, 1817, and an act entitled "An act to establish the judicial courts of the United States," passed September 24th, 1789, did call and cause to be and personally appear before me, at my office, at number 71 Wall street, in the city of New York, in the said southern district of New York, in the State aforesaid, William H. Freeman, to testify and the truth to say, on the part and behalf of the libellants & appellants in a certain suit or matter of controversy now depending and undetermined in the circuit court of the United States for the southern district of New York, 2nd circuit, at New York, wherein Henry B. Merrill, David G. Floyd, Charles Bates, Henry S. Ackley, executor of the last will and testament of Elisha S. Channisson, deceased, & als., are libellants, against the schooner "Mary Eveline," her tackle, &c.

And the said William H. Freeman having been by me first cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, in the matter of controversy aforesaid, I did carefully examine the said William H. Freeman, and he did thereupon depose, testify, and say as follows, viz:

I am 42 years of age. I reside at Sag Harbor, Long Island, and am a sea-faring man, engaged in the coasting trade. I have been a sea-faring man thirty years. I have been master of a vessel some fifteen or sixteen years. I have been coasting mostly through the Sound to Boston, and also to Philadelphia. I am acquainted with the navigation of Hell-Gate.

1. Q. Is there a usage when going through Hell-Gate, stemming the tide, with a fair wind, as to what position a vessel shall take and keep?
(Obj. to.)
A. Yes, sir; we consider it so.
2. Q. What is the usage?
(Obj. to.)
A. If we are going up with a fair wind we generally go as close to one side or the other as possible, so as to keep out of the tide and give vessels beating down a chance in the river.

108 3. Q. In the case of a vessel going east through Hell-Gate, in the eastern channel, with a fair wind stemming a strong ebb tide, and discovering two schooners at a distance beating down, the first-named vessel at the time being close under Blackwell's Island, what is it her duty to do with reference to the two schooners which she sees beating down?
(Obj. to.)
A. I should take a course and keep it. The vessel stemming the tide should take one shore or the other, and hold it.
4. Q. In the case supposed in question 3, what position should the vessel with a fair wind take and keep?
(Obj. to.)
A. I think she should keep close under the island, so as to give vessels a chance in the river.
5. Q. Is it usual to go through Hell-Gate against the tide when there is wind enough to stem it?
(Obj. to.)
A. Oh, yes; everybody does that.

W'M H. FREEMAN.

109 UNITED STATES OF AMERICA,
Southern District of New York,
City, County, and State of New York, ss:

Be it remembered, that on this 21st day of September, in the year of our Lord one thousand eight hundred and seventy, I, Edward L. Owen, a commissioner duly appointed by the circuit court of the United States for the southern district of New York, in the second circuit, under and by virtue of the acts of Congress entitled "An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States," passed February 20th, 1812, and the act of Congress entitled "An act in addition to an act entitled 'An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States,'" passed March 1st, 1817, and an act entitled "An act to establish the judicial courts of the United States," passed September 24th, 1789, did call and cause to be and personally appear before me, at my office at number 71 Wall street, in the city of New York, in the said southern district of New York, in the State aforesaid, Henry S. Rackett, to testify, and the truth to say, on the part and behalf of the libellants & appellants in a certain suit or matter of controversy now depending and undetermined in the circuit court of the United States for the southern district of New York, 2d circuit, at New York, wherein Henry B. Merrill, David G. Floyd, Charles Bates, Henry S. Ackley, executor of the last will and testament of Elisha S. Chanisson, deceased, & als., are libellants, against the schooner "Mary Eveline," her tackle, &c.

And the said Henry S. Rackett having been by me first cautioned and sworn to testify the truth, the whole truth, and nothing but the

truth, in the matter of controversy aforesaid, I did carefully examine the said Henry S. Rackett, and he did thereupon depose, testify, and say as follows, viz:

I am 54 years of age. I have been a sea-faring man about thirty-five years, and master of a vessel about thirty, and mostly engaged in the coasting business through the Long Island Sound, and between Philadelphia & Boston. I reside at Orient, Long Island. I am acquainted with the navigation of Hell-Gate.

1. Q. When a vessel is going through Hell-Gate, stemming the tide with a fair wind, is there a usage as to what position she shall take and keep?

(Obj. to.)

A. There is.

2. Q. What is that usage?

(Obj. to.)

A. To keep along in the eddy or slack water.

3. Q. What should be her position with reference to the shore?

(Obj. to.)

110 A. Inasmuch as the eddy or slack water is close in by the shore, the position of the vessel should be as near the shore as possible.

4. Q. In the case of a vessel going east through Hell-Gate in the eastern channel, with a fair wind, stemming a strong ebb tide, and discovering two schooners at a distance beating down, the first-named vessel at the time being close under Blackwell's Island, what is it her duty to do with reference to the two schooners which she sees beating down?

(Obj. to.)

A. To retain her position under the island, if she has the island close aboard.

Cross-exam'd by counsel for claimant:

5. Q. Why should she retain this position?

A. I should conceive the probabilities of collision more imminent by altering her position.

6. Q. Would it not be proper under such circumstances for the first-named vessel to luff when seeing other vessels tacking on the Long Island shore?

A. I think not, if she has the island close-aboard; she could possibly luff, seeing them tack on the opposite shore, but it would have been imprudent for her to do so, because the stream is very narrow there; that is the only reason.

H. S. RACKETT.

111 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, Edward L. Owen, a commissioner duly appointed by the circuit court of the United States for the southern district of New York, in the second circuit, under and by virtue of the acts of Congress entitled "An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States," passed February 20th, 1812, and the act of Congress entitled "An act in addition to an act entitled 'An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States,'" passed March 1st, 1817, and the act entitled "An act to establish the judicial courts of the United States," passed September 24th, 1789, do hereby certify that the reason for taking the foregoing deposition is, and the

fact is the witnesses are material and necessary in the cause in the caption of the said deposition named, and that the said cause is now on appeal to the circuit court of the United States for the southern district of New York, 2d circuit.

I further certify that due notification of the time and place of taking the said deposition, signed by me, was made out and served on the attorney for the adverse party to be present at the taking of the said deposition and put interrogatories, if he or they might think fit. I further certify that, on the twenty-first day of September, in the year of our Lord one thousand eight hundred and seventy, I was attended by the proctors for the respective parties, and by the witnesses, who were of sound mind and lawful age, and the witnesses were by me first carefully examined and cautioned, and sworn to testify the truth, the whole truth, and nothing but the truth, and the depositions were by me reduced to writing in the presence of the witnesses, and from their statements, and after carefully reading the same to the witnesses, they subscribed the same in my presence. I have delivered the same to the proctors for the libellant & appellant, pursuant to a stipulation entered into by and between the proctors for the respective parties. And I do further certify that I am not of counsel nor attorney for either of the parties in the said deposition and caption named, nor in any way interested in the event of the cause named in said caption.

In testimony whereof I have hereunto set my hand and seal this 21st day of September, in the year of our Lord one thousand eight hundred and seventy, and of the independence of the United States the ninety-fifth.

[L. S.] EDWARD L. OWEN,
United States Commissioner, duly appointed by the Circuit Court of the United States for the Southern District of New York, in the second circuit.

112 (Indorsed:) Vol. , page . United States circuit court for the southern district of New York, second circuit. Henry B. Merrill & als., appellants vs. The Schooner "Mary Eveline," her tackle, &c. Deposition of witnesses on behalf of the libellants & appellants, taken on appeal the 21st day of September, 1870, before me, Edward L. Owen, United States commissioner, on the day of 18 , by stipulation, filed, nunc pro tunc, as of 23d day of Sept., 1870.

113 UNITED STATES OF AMERICA,
Southern District of New York,
City, County, and State of New York:

Be it remembered, that on this 19th day of November, in the year of our Lord one thousand eight hundred and seventy, I, Edward L. Owen, a commissioner duly appointed by the circuit court of the United States for the southern district of New York, in the second circuit, under and by virtue of the acts of Congress entitled "An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States," passed February 20th, 1812, and the act of Congress entitled "An act in addition to an act entitled 'An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States,'" passed March 1st, 1817, and an act entitled "An act to establish the judicial courts of the United States," passed September 24th, 1789, did call and cause to be and personally appear before me, at my office at number 71 Wall street, in the city of New York, in the said southern district of New York, in

the State aforesaid, Francis Bell, to testify, and the truth to say, on the part and behalf of the appellees in a certain suit or matter of controversy now depending and undetermined in the circuit court of the United States for the southern district of New York, at New York, wherein Henry B. Merrill & als. are libellants and appellees, and the schooner "Mary Eveline," her tackle, &c., is claimant and appellant.

And the said Francis Bell having been by me first cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, in the matter of controversy aforesaid, I did carefully examine the said Francis Bell, and he did thereupon depose, testify, and say as follows, viz:

I am 26 years of age; I am Hell-Gate pilot by occupation, and have been such for years; I am acquainted with the navigation of the channel of the East River between Blackwell's Island and Long Island.

1 Q. What is the character of the shore and water on the Blackwell's Island side of that channel?

(Objected to.)

A. There is good water on the Blackwell's Island shore, except in one or two places; yes, three places; one is midway, and the other two *and* each end. The character of those places is shoal, two single rocks and reef. There is good water everywhere else. There is a wall there running all along. In some cases vessels will run very close to Blackwell's Island shore. I have seen them stand in so near that a man might jump on shore, I should think. A vessel sailing up with a fair
114 wind would hold closer along the island than one beating down. I don't think there is an eddy current running at or near the Lunatic Asylum on an ebb tide.

2 Q. Have you or not observed an eddy current on either side of the channel, when an ebb tide was running, I mean on the Long Island or Blackwell's Island shores?

(Obj. to.)

A. There is an eddy below Ravenswood Reef on the Long Island shore, and there is one at the upper end of Ravenswood on the Long Island shore. There are no others.

3 Q. What is the character of those eddys?

A. I would like an explanation.

4 Q. Question repeated.

A. The eddy is caused by the tide breaking over the reef at Ravenswood, and the upper one is caused by the point of land. The tide setting out from Hallett's Cove around this point forms an eddy.

5 Q. How far do these eddys extend out on an ebb tide?

A. I should think the lower one extended out perhaps a hundred feet; that is off Ravenswood dock. The upper one is about half the distance, running to a point.

6 Q. How far up and down do they extend?

A. They diminish gradually in strength, in width, as the tide gets more hold of them. The lower eddy extends up and down the shore 300 yards, and the upper one, I should think, about 200 yards.

7 Q. In the case of a vessel going east through Hell Gate in the eastern channel with a fair wind, stemming a strong ebb tide, and discovering two schooners at a distance, beating down, the first *the first* named schooner at the time tacking close under Blackwell's Island, what is it her duty to do with reference to the two schooners she sees beating down?

115 (Obj. to on the ground that the witness is not shown to be an expert.)

A. I should think it was her place to keep out of the schooner's way.

8. Q. Should she take a course and hold it on one shore or the other, without reference to the two schooners?

(Obj. to on the same ground as before.)

A. It is not customary for a vessel to do that.

9. Q. Is there any custom as to the direction a vessel, sailing up under those circumstances, shall take?

(Obj. to on the same grounds.)

A. There is no particular course to take; that is, by compass.

10. Q. What is the custom as to the course she shall take with reference to the other vessel, if any?

(Obj. to on the same grounds.)

A. She should keep off, or luff any way to avoid them.

(Answer objected to as not responsive.)

11. Q. Is there an' custom as to vessels coming through that channel on a' ebb tide from the eastward?

A. No particular custom, only standing from shore to shore, standing their tacks out.

12. Q. In the case of a vessel coming from the eastward, would she or not wait for an ebb tide to come through the channel, when the wind is blowing strong from the southward?

116 A. Yes, sir.

13. Q. What is the custom, if any, as to a vessel undertaking to pass up the channel under those circumstances? Would she ordinarily do this, or wait for a change of tide?

(Obj. to.)

A. It is customary for a vessel to anchor until the tide slacks.

Cross-exam'd by counsel for claimants.

14. Q. Do you mean to say that when a vessel can stem the tide through that channel, it is customary for her not to do so, but to anchor?

A. Well, I always anchor when the tide is running full strength.

15. Q. Question repeated.

A. Well, I couldn't say as to that. I have no other answer. I live in Brooklyn.

16. Q. What was your occupation before you were Hell-Gate pilot?

(Obj. to on the ground that it is immaterial. It appearing that the witness is a Hell-Gate pilot, he is an expert and a competent witness for the purposes of the testimony sought.)

A. I was engaged on a steamboat just before, and left her to go and serve my apprenticeship. I left the tug-boat Spray, a tug-boat
117 around the harbor. I was in the Spray three months. I was sailing an oyster sloop from City Island to New York before I went in the Spray. She was $16\frac{38}{95}$ tons measurement. I was in her, I think, nine or ten years, running in that business all the time. Part of the time I was captain of her. I think I had charge of her three years; it might have been four. As such it was my business to run through that channel every week, and sometimes several times a week. I have a license as Hell-Gate pilot. I am principally stationed at New York City.

17. Q. Suppose two schooners, both light, beating down the channel spoken of, against a whole-sail breeze, and perhaps a little more, with a strong ebb-tide. The head one of the two schooners, having tacked

within fifty feet of the Long Island shore, and standing towards Blackwell's Island, when the schooner astern tacks within from twenty to forty feet from the Long Island shore, and when about and filled away, her jib-boom is pointing to the foremast of the head schooner, which has already tacked again under Blackwell's Island and filled away, and is at that instant distant about 160 feet from the stern schooner, and while the two schooners are in that position a sloop is 300 feet below the head schooner, and is bearing off her starboard bow at 75
118 feet distant from the Blackwell's Island shore, what course or manœuvre should be taken or adopted by the sloop under such circumstances?

A. I could not tell what course could be adopted. I don't see how they could get clear of a collision at that distance apart.

18. Q. Does the tide run as strong within 75 feet of Blackwell's Island as it does in the middle of the channel?

A. Yes, sir.

19. Q. Does it run as strong clear up to the shore as it does in the middle of the channel?

A. In some places it runs stronger. I hardly think the tide runs as strong close up to the dock at the lunatic asylum as it does in the middle of the river.

20. Q. I' case of a sloop deeply loaded, stemming the ebb-tide through that channel, and close in on the Blackwell's Island shore, and two schooners beating down some distance from the sloop, each schooner about 160 feet long over all, would it not be safer for the sloop to keep her position close under the island than it would for her to haul out into the river in such a way as to bring her into the track of the two schooners?

A. I think it would be more safe for her to luff over across the river, when she saw the schooners tacking.

119 21. Q. Please state when, with reference to the position of the schooners, the sloop should commence to luff?

A. She should commence to luff when either one tacked on the Long Island shore.

22. Q. Suppose when the second schooner tacked on the Long Island shore she tacked within 40 feet of the shore, and the head schooner at that time had gone across the river to within 100 feet of Blackwell's Island, then when should the sloop begin to luff?

A. I should say the sloop should luff when she saw the first schooner tacking under Long Island shore.

23. Q. Suppose at the time the first schooner was tacking under Long Island shore, the second schooner was half way across the river bound towards Long Island, and was yet to make her tack under the Long Island shore, when, then, should the sloop commence to luff?

A. When she saw the first schooner tacking.

Redirect:

24. Q. Suppose a vessel sailing up that channel with the wind free, tide ebb, with her boom on her port side two points 'baft the beam, the boom being 55 feet long, the vessel 20 feet wide, how near could she run to the Blackwell's Island shore, at a point off the lunatic asylum? That is, what would be the distance between her port side and the Blackwell's Island shore?

120 A. She could run in so that her main boom would touch the shore; that is, the wall.

25. Q. Did you see the wreck of the Ethan Allen, at *at* or about the time of this collision?

A. Yes; I saw her masts sticking up out of the water after she sunk.

26. Q. At what point did you see her?

(Obj. to.)

A. I could not tell precisely, but I think it was off the mad-house.

27. Q. What was her position in the channel?

(Obj. to.)

A. About midway.

28. Q. At or about off this point does, or not, an eddy current prevail of any account on an ebb-tide at its strength?

A. No, sir.

Re-cross:

I saw the mast of the Ethan Allen the morning after the collision, I think.

FRANCIS BELL.

121 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, Edward L. Owen, a commissioner duly appointed by the circuit court of the United States for the southern district of New York, in the second circuit, under and by virtue of the acts of Congress entitled "An act for the more convenient taking of affidavits and bail in civil causes, depending in the courts of the United States," passed February 20th, 1812, and the act of Congress entitled "An act in addition to an act entitled 'An act for the more convenient taking of affidavits and bail in civil causes, depending in the courts of the United States,'" passed March 1st, 1817, and the act entitled "An act to establish the judicial courts of the United States," passed September 24th, 1789, do hereby certify that the reason for taking the foregoing deposition is, and the fact is, the witness is material and necessary in the cause in the caption of the said deposition named, and that the said cause is now pending on appeal to the circuit court of the United States for the southern district on New York, 2d circuit.

I further certify that due notification of the time and place of taking the said deposition signed by me was made out and served on the proctor for the adverse party, to be present at the taking of the said deposition and to put interrogatories if he or they might think fit.

I further certify that on the nineteenth day of November, in the year of our Lord one thousand eight hundred and seventy, I was attended by the proctors for the respective parties, and by the witness, who was of sound mind and lawful age, and the witness was by me first carefully examined and cautioned, and sworn to testify the truth, the whole truth, and nothing but the truth, and the deposition was by me reduced to writing in the presence of the witness, and from his statements, and after carefully reading the same to the witness, he subscribed the same in my presence. I have retained the said deposition in my possession for the purpose of filing the same with my own hand in the court for which the same was taken.

And I do further certify that I am not of counsel nor attorney for either of the parties in the said deposition and caption named, nor in any way interested in the event of the cause named in said caption.

In testimony whereof I have hereunto set my hand and seal this 19th day of November, in the year of our Lord one thousand eight hundred

and seventy, and of the independence of the United States the ninety-fifth.

EDWARD L. OWEN,
United States Commissioner, duly appointed by the Circuit Court of the United States for the Southern District of New York, in the Second Circuit.

122 (Indorsed:) Vol. , page . United States circuit court for the district of . Henry B. Merrill & als. vs. The Schooner Mary Eveline, her tackle, &c. Deposition of witness on the part of the appellees, taken before me, Edward L. Owen, United States commissioner, on the day of , 18 . Filed the 25th day of Nov., 1870.

123 UNITED STATES OF AMERICA,
Southern District of New York,
City, County, and State of New York, ss:

Be it remembered that on this 21st day of November, in the year of our Lord one thousand eight hundred and seventy, I, Edward L. Owen, a commissioner duly appointed by the circuit court of the United States for the southern district of New York, in the second circuit, under and by virtue of the acts of Congress entitled "An act for the more convenient taking of affidavits and bail in civil causes, depending in the courts of the United States," passed February 20th, 1812, and the act of Congress entitled "An act in addition to an act entitled 'An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States,'" passed March 1st, 1817, and an act entitled "An act to establish the judicial courts of the United States," passed September 24th, 1789, did call and cause to be and personally appear before me, at my office, at number 71 Wall street, in the city of New York, in the said southern district of New York, in the State aforesaid, Charles S. Weaver, to testify and the truth to say, on the part and behalf of the appellees, in a certain suit or matter of controversy now depending and undetermined in the circuit court of the United States for the southern district of New York, at New York, wherein Henry B. Merrill and others are libellants and appellees and the schooner Mary Eveline, her tackle, apparel, &c., is claimant and appellant.

And the said Charles S. Weaver, having been by me first cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, in the matter of controversy aforesaid, I did carefully examine the said Charles S. Weaver, and he did thereupon depose, testify, and say as follows, viz:

I am 34 years of age. I am Hell-Gate pilot, and am acquainted with the navigation of the channel of the East River between Blackwell's Island and Long Island. I have been a pilot sixteen years, that is, including the time as an apprentice. I know there was a collision between the Mary Eveline and the sloop Ethan Allen. I saw the wreck of the Ethan Allen; I think it was the next day; it was a day or two after; I saw her several times, perhaps twenty times.

Q. Where did she lay at the time you saw her?

A. In the centre of the channel, about half way from the work-house to the lunatic asylum. These buildings are on Blackwell's Island.

2 Q. On an ebb-tide does or not an eddy current prevail about that point?

A. No; not on either side.

3 Q. What is the character of the water and the shore on the Blackwell's Island side of that channel?

124 A. The best water in that channel is close in along the Blackwell Island shore. I mean that the water is deep along that shore, with the exception of two places; one is above the lunatic asylum; there is a rock there right on shore; it is 400 yards above where I saw the wreck laying. The other point is the south end of the island, near the small-pox hospital. Neither one of the rocks run more than 20 feet from the shore. Vessels can sail close by these rocks. I have been in a vessel drawing 15 feet so close that the captain thought she was going on to them. There is a wall extending almost the entire length of Blackwell's Island.

4 Q. How close to Blackwell's Island shore can a vessel run with safety?

A. Thirty feet from the wall anywhere along there.

5 Q. How near can a vessel go to the Blackwell Island shore anywhere in the vicinity of where you saw the wreck of the Ethan Allen and the lunatic asylum?

A. I should say fifteen feet from the wall would be near enough, with a vessel of the heaviest draft; might go closer with a smaller vessel. We could go within fifteen feet on a low tide, and on a high tide we can go right up to it.

6 Q. Could a vessel sailing up with a fair wind go closer to the island than one beating down?

A. Yes, sir.

7 Q. In the case of a vessel going east through Hell Gate in such channel, with a fair wind, stemming a strong ebb-tide, and discovering two schooners at a distance beating down, the first-named schooner at the time tacking close under Blackwell's Island and the other following, what is it her duty to do with reference to the two schooners she sees beating down?

A. It is her duty to keep clear of them, to give them a chance.

125 8 Q. What could she do under such circumstances to avoid a collision?

A. He could have hauled on to the wind and beat down the channel, or he could have kept off, lowered his sails down, and kept as close to the Blackwell Island shore as he possibly could.

9 Q. Should a vessel sailing up under those circumstances at a distance of 75 feet off Blackwell's Island shore have taken a course and held it, on one shore or the other, without reference to the two schooners?

A. No.

10 Q. Is there any custom as to the course a vessel sailing up under these circumstances shall take?

A. No.

11 Q. Is it or not customary for vessels coming from the eastward through that channel to wait for an ebb-tide?

A. It is.

12 Q. Is it or not customary for vessels going eastward through that channel to wait for a flood-tide before going up through the channel?

A. Yes; always been a custom.

13 Q. Is it or not customary for vessels about to go to the eastward through that channel, when discovering an ebb-tide running, to anchor and wait for a change of tide?

A. It is always. Vessels never used to think of entering that

126 channel on a' ebb-tide, going to the eastward. Now they some

times do, but it is understood that they take their chances. They must have a free wind or else they cannot go through on a' ebb-tide.

14 Q. Suppose a sloop sailing up that channel at a distance of 75 feet off of Blackwell's Island shore, with a boom 55 feet long, two points baft the beam, her width being 20 feet, she being at this moment about 300 feet from a vessel beating towards her, followed immediately by a second vessel on a tack, what course could such a vessel sailing up at this moment adopt to avoid a collision?

A. To keep off, haul his boom in, lower his sail, and keep close to Blackwell's Island.

15 Q. Suppose a vessel sailing up that channel under the above circumstances, having a schooner just tacking off her starboard bow within about 200 feet of her, and another schooner having just gone about, on the Long Island shore and just filling away, her stern being about 30 feet from Long Island shore, the last-named schooner's stern at this moment pointing to the foremast of the first schooner, what course, if any, should the second schooner adopt under these circumstances?

A. She should go under the stern of the first schooner; she could not tack inside, because she could not get headway enough.

CHARLES S. WEAVER.

127 Cross-examination adjourned to the 22d at 12 m.

NOV. 22d. Present, commissioner & counsel for respective parties. Counsel for appellants being engaged, cross-examination of above witness adjourned to the 23d at 9 a. m.

NOV. 23d. Present, commissioner and counsel for respective parties. Cross-examination adjourned.

128

129 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, Edward L. Owen, a commissioner duly appointed by the circuit court of the United States for the southern district of New York, in the second circuit, under and by virtue of the acts of Congress, entitled "An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States," passed February 20th, 1812, and the act of Congress entitled "An act in addition to an act entitled 'An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States,'" passed March 1st, 1817, and the act entitled "An act to establish the judicial courts of the United States," passed September 24th, 1789, do hereby certify that the reason for taking the foregoing deposition is, and the fact is, the witness is material and necessary in the cause in the caption of the said deposition named, and that the said cause is now pending and on appeal to the circuit court of the United States for the southern district of New York, second circuit.

I further certify that due notification of the time and place of taking the said deposition signed by me was made out and served on the proctor for the adverse party to be present at the taking of the said deposition and to put interrogatories, if he or they might think fit.

I further certify that, on the 22d & 23d days of November, in the year of our Lord one thousand eight hundred and seventy, I was attended by the proctors for the respective parties; and that, on the 21st day of November, in the same year, I was attended by the counsel for the ap-

pellees, as appears from the minutes of testimony, and by the witness, who was of sound mind and lawful age, and the witness was by me first carefully examined and cautioned, and sworn to testify the truth, the whole truth, and nothing but the truth, and the deposition was by me reduced to writing in the presence of the witness, and from his statements, and after carefully reading the same to the witness, he subscribed the same in my presence. I have retained the said deposition in my possession for the purpose of filing the same with my own hand in the court for which the same was taken.

And I do further certify that I am not of counsel nor attorney for either of the parties in the said deposition and caption named, nor in any way interested in the event of the cause named in said caption.

In testimony whereof I have hereunto set my hand and seal this 23d day of November, in the year of our Lord one thousand eight hundred and seventy, and of the independence of the United States the ninety-fifth.

EDWARD L. OWEN,
United States Commissioner duly appointed by the Circuit Court of the United States for the Southern District of New York, in the Second Circuit.

130 (Indorsed:) Vol. , page . United States circuit court for the district of . Henry B. Merrill & als. vs. The Schooner Mary Eveline, her tackle, &c. Deposition of witness on the part of the appellees, taken before me, Edward L. Owen, United States commissioner, on the day of , 18 . Filed the 25 day of Nov'r, 1870.

131 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the United States court-rooms in the city of New York, on Friday, the 25th day of November, in the year of our Lord one thousand eight hundred and seventy—

Present, the Honorable Lewis B. Woodruff, circuit judge.

HENRY B. MERRILL & AL., LIBELLANTS & appellants,
vs.
THE SCHOONER MARY EVELINE, &C., RESPONDENT & appellee.

This cause coming on to be heard on appeal from the district court—

Mr. Richard H. Huntley reads testimony from the apostles on the part of the libellants & appellants.

Mr. C. Donohue reads testimony from the apostles on the part of the respondent and appellee.

Mr. R. H. Huntley argues on the part of libellants and appellants.

Mr. C. Donohue argues on part of respondent & appellee.

Mr. R. H. Huntley is heard in reply.

Decree below affirmed.

132

133 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the United States court-rooms in the city of New York,

on Wednesday, the 1st day of February, in the year of our Lord one thousand eight hundred and seventy-one—

Present, the Honorable Lewis B. Woodruff, circuit judge.

HENRY B. MERRILL, DAVID G. FLOYD, Charles Bates, and Henry S. Ackley, as executors of Elisha S. Champion, owners of the sloop Eathan Allen, and C. Whitehead and W. W. Whitehead, composing the firm of C. & W. Whitehead.
vs.
THE SCHOONER MARY EVELINE, HER tackle, &c.

This cause coming on to be heard on the record herein, together with additional evidence taken in this court, and being argued by the advocates of the respective parties, and due deliberation being had, it is ordered, adjudged, and decreed that the decree herein be affirmed, with costs to be taxed, and such costs having been taxed at one hundred sixty-nine and $\frac{42}{100}$ dollars, judgment final is hereby decreed, that the libel be dismissed and that the claimant recover against said libellants the sum of fifty-three and $\frac{82}{100}$ dollars, costs in the district court, together with interest from November 6, 1869, amounting to the sum of four and $\frac{35}{100}$ dollars, and also the amount of his costs in this court, making in all the sum of two hundred and twenty-seven $\frac{59}{100}$ dollars, ($227.59,) and that the claimants have execution therefor.

$169	42
53	82
4	35
$227	59

L. B. WOODRUFF,
Circuit Judge.

134

135 Circuit court of the United States for the southern district of New York, in the second circuit.

HENRY B. MERRILL, DAVID G. FLOYD, Charles Bates, Henry S. Ackley, C. Whitehead, and W. Whitehead, libellants & appellants,
against
THE SCHOONER MARY EVELINE, HER tackle, &c., John W. Petty and Isaac Homan, claimants and appellees.

Take notice that the above-named appellants hereby appeal from the decree, and every part thereof, entered in the above-entitled cause in this court, to the Supreme Court of the United States.

Dated New York, February 11, 1871.

Yours, &c.,

RICHARD H. HUNTLEY,
Proctor Lib'l'ts, App'l'ts.

To K. G. WHITE, Esq., *Clerk.*
" F. A. WILCOX,
Proctor for Cl'm'ts, Appellees.

136 (Endorsed:) U. S. circuit court, southern dist. of N. Y. Henry B. Merrill et al., l'b'll'ts & app'll'ts, ag'st The Schooner Mary Eveline, her tackle, &c., John W. Petty & ano', cl'm'ts & appellees. Notice of appeal to U. S. Supreme Court. R. H. Huntley, proctor for lib'll'ts & app'll'ts. Filed Feb'y 11, 1871.

137 Circuit court of the United States, southern district of New York, in the second circuit.

HENRY B. MERRILL, DAVID G. FLOYD, CHARLES Bates, Henry S. Ackley, C. Whitehead, and W. Whitehead, libellants and appellants,
against
THE SCHOONER MARY EVELINE, HER TACKLE, apparel, &c., John W. Petty and Isaac Homan, claimants and appellees.

To the honorable the Supreme Court of the United States:

The appeal of Henry B. Merrill, David G. Floyd, Charles Bates, Henry S. Ackley, C. Whitehead, and W. Whitehead, the above-named libellants and appellants, respectfully showeth that, on the 25th day of December, 1868, these libellants and appellants filed their libel in the district court of the United States for the southern district of New York, against the schooner Mary Eveline, her tackle, apparel, and furniture, in a cause, civil and maritime, for the recovery of damages alleged to have been sustained by them to the sloop Ethan Allen and her cargo, by collision with the said schooner Mary Eveline, on the East River, in the State of New York, and that the said schooner, Mary Eveline, was arrested upon process issued upon said libel, and
138 was discharged upon the claimants of said schooner filing their claim and entering into stipulations, and the claimants thereupon filed their answer to said libel, and such proceedings were had in the said cause that, on the 19th day of October, 1869, a final decree was made and pronounced therein by the said district court, wherein it was adjudged that the said libel of these libellants be dismissed with costs.

And that, after such final decree, your petitioners duly appealed therefrom to the circuit court of the United States for the southern district of New York, in the second circuit, and the said cause was removed thereby into the said circuit court, and there tried anew; and such proceedings were had in the said circuit court, that afterwards, on the 1st day of February, 1871, the said circuit court made a final decree in the said cause, whereby it was decreed that the said decree of the district court be in all things affirmed, with costs, and that the said claimants have execution; which said decree of the said circuit court is, as these appellants are advised, erroneous and ought to be reversed.

Wherefore these appellants appeal from the whole of said decree of said circuit court to the Supreme Court of the United States, and respectfully pray that the decree of the said circuit court, and the libel, answer, pleadings, depositions, evidence, and proceedings in the
139 said cause may be sent to the Supreme Court of the United States without delay, and that the said Supreme Court will proceed to hear the said cause anew, and that the said decree of the circuit court and every part thereof may be reversed, and a decree made in favor of these appellants, in conformity with the prayer in their said

libel, with costs, or such other decree as to the said Supreme Court shall seem just.

Dated New York, February 11th, 1871.

RICHARD H. HUNTLEY,
Proctor for Libellants & Appellants.

(Endorsed:) U. S. circuit court. Henry B. Merrill & al., lib'll'ts & app'll'ts, ag'st The Schooner Mary Eveline, &c., &c. John W. Petty & ano', cl'm'ts & appellees. Appeal to the U. S. Supreme Court. R. H. Huntley, proctor for lib'll'ts & app'll'ts. Filed Feb'y 11, 1871.

140

141 *Bond for costs.*

Circuit court of the United States of America for the southern district of New York, in the second circuit.

HENRY B. MERRILL, DAVID G. FLOYD, CHARLES Bates, Henry S. Ackley, C. Whitehead, and W. Whitehead, libellants and appellants,
vs.
THE SCHOONER MARY EVELINE, HER TACKLE, &c., John W. Petty and Isaac Homan, claimants and appellees.

Know all men by these presents, that we, David G. Floyd, of Greenpoint, L. I., and Dennis C. Pratt, of New York City, and John F. Willetts, of New York City, are held and firmly bound unto the above-named John W. Petty and Isaac Homan in the sum of five hundred dollars, to be paid to the said appellees, for the payment of which well and truly to be made we bind ourselves, and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents, sealed with our seals, and dated the 11th day of February, in the year of our Lord one thousand eight hundred and seventy-one.

Whereas the above-named appellants have prosecuted an appeal to the Supreme Court of the United States, at the city of Washington, in the District of Columbia, to reverse the decree rendered in the above-entitled suit, by the judge of the circuit court of the United States for the southern district of New York:

Now therefore the condition of this obligation is such, that if the above-named appellants shall prosecute their appeal to effect and answer all damages and costs, if they fail to make their appeal, good then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

DAVID G. FLOYD. [L. S.]
DENNIS C. PRATT. [L. S.]
JNO. T. WILLETTS. [L. S.]

Sealed and delivered, and taken and acknowledged this 11th day of February, 1871, before me.

JOHN A. SHIELDS,
U. S. Commissioner, S. D. of N. Y.

142 UNITED STATES OF AMERICA,
Southern District of New York, ss:

Dennis C. Pratt, of 230 East 34th street, New York City, and John T. Willets, 27 West 35th street, New York City, being duly sworn, depose and say, and each for himself saith, that he is worth the sum of one thousand dollars, over and above all his just debts and liabilities.

Sworn to this 11 day of February, A. D. 1871, before me.

DENNIS C. PRATT.
JNO. T. WILLETS.

I approve the above bond and the sufficiency of the sureties thereto. February eleventh, 1871.

SAM'L BLATCHFORD, *D. C.*

(Indorsed:) Vol. , page . U. S. circuit court, southern district of N. Y. Henry B. Merrill & al., lib'll'ts & app'll'ts, vs. The Sch'r Mary Eveline, her tackle, &c., John W. Petty & ano., cl'm'ts & appellees. Bond on appeal to U. S. Supreme Court. Richard H. Huntley, proctor for lib'll'ts & app'll'ts. Filed this 11 day of February, 1871.

143 By the honorable Samuel Blatchford, one of the judges of the circuit court of the United States for the southern district of New York, in the second circuit, to John W. Petty and Isaac Homan:

Whereas Henry B. Merrill, David G. Floyd, Charles Bates, Henry S. Ackley, C. Whitehead, and W. Whitehead, have lately appealed to the Supreme Court of the United States, from a decree lately rendered in the circuit court of the United States for the southern district of New York, in the second circuit, dismissing their libel against the schooner Mary Eveline, her tackle, &c., of which you are the owners, and have filed the security required by law: You are, therefore, hereby cited to appear before the said Supreme Court, at the city of Washington, on the 1st Monday of December, 1871, to do and receive what may appertain to justice to be done in the premises.

Given under my hand, at the city of New York, in the southern district of New York, in the second circuit, the eleventh day of February, in the year of our Lord one thousand eight hundred and seventy-one, and of the independence of the United States the ninety-fifth.

SAM'L BLATCHFORD.

144 SOUTHERN DISTRICT OF NEW YORK, *ss:*

M. F. Eller, being duly sworn, says that, on the eleventh (11th) day of February, 1871, at No. 52 Wall street, in the city of New York, he served a copy of within citation on F. A. Wilcox, esq., the proctor for the appellees herein, by delivering the same to him personally, and leaving the same with him personally, on the day and at the place aforesaid.

M. F. ELLER.

Sworn to before me, April 6th, 1871.

JOHN A. SHIELDS,
U. S. Com'r.

(Endorsed:) U. S. circuit court, southern district of New York. Henry B. Merrill & al., lib'l'ts & appellants, vs. The Schooner Mary

Eveline, her tackle, &c., John W. Petty & ano', cl'm'ts & appellees. Citation. R. H. Huntley, proct'r for lib'l'ts & appell'ts.

Due service of a copy of within citation is hereby admitted.
Dated N. Y., Feb'y 11, 1871.

Proctor for Cl'm'ts & Appellees.

Filed Feb'y 11, 1871.

(Indorsement on cover:) No. 441. Henry B. Merrill, David G. Floyd, Cha's Bates, H. S. Ackley, C. Whitehead, and W. Whitehead, lib'ts, appellants, vs. The Schooner Mary Eveline, &c., John W. Peatty & Isaac Homan. S. New York, C. C. U. S. Filed 1st December, 1871.

REC. 441—6

Supreme Court

OF THE UNITED STATES.

HENRY B. MERRILL, DAVID G. FLOYD, CHARLES BATES, H. S. ACKLEY, C. WHITEHEAD, and WILLIAM WHITEHEAD,
Libellants and Appellants,

against

THE SCHOONER MARY EVELYN, &c.,
Respondent.

POINTS FOR HENRY B. MERRILL AND OTHERS, APPELLANTS.

STATEMENT.

This is an appeal from a decree of the Circuit Court of the United States, for the Southern District of New York, affirming a decree of the District Court dismissing the libel which was filed by the appellants to recover for their dam-

ages and loss by a collision between the sloop Ethan Allen, owned by the libellants, and the schooner Mary Evelyn.

After the libel in this action had been filed, and while this action was pending, John W. Petty and Isaac Homan, claimants of the Mary Evelyn, filed their libel *in personam* in the District Court for the Eastern District of New York, in the nature of a cross libel against Henry B. Merrill and others, owners of the sloop Ethan Allen, to recover for the damages alleged to have been done to the Mary Evelyn in the same collision. The calendar in the Eastern District not being as large as that in the Southern District, this latter cause of Petty, *et al.*, against Merrill, *et al.*, was first reached, and by consent of the proctors, both causes were tried together in the Eastern District, and the result was a dismissal of the libel in the first cause, and a decree for the libellants in the second cause. The decrees were entered in the districts where the libels were respectively filed.

The libellants herein, Henry B. Merrill and others, appealed from the decrees in both actions. The appeal of Petty and Homan, against Merrill *et al.*, is now on the calendar of this court, and is number 485.

FACTS.

On the 20th of September, 1868, the sloop Ethan Allen, of 41 tons burden, (fols. 3, 53,) deeply laden with sand and clay, (fols. 49, 67,) was passing to the eastward through Hell Gate on her way to Middletown, Connecticut. (Fols. 3, 49.) She had the wind fair, her boom trimmed about two points abaft the beam. (Fols. 52, 53, 71.) The wind was blowing fresh, and the sloop had her peak slacked, (fols. 50, 90), but otherwise she was under a full mainsail and jib. She was so deeply loaded that her bow-sprit was but about 18 inches above the water. (Fol. 43.) She was stemming a strong ebb tide, which was running from five to six knots per hour. (Fols. 31, 50, 81.) She was running so close under the eastern shore of Blackwell's Island, that the end of her boom, which she

carried on her port side, was within 10 to 15 feet of the sea wall of the Island as she passed along parallel with it, and her hull was in fact about 75 feet from the Island. (Fols. 32, 43, 50, 51, 52, 56, 65, 67, 73, 75, 82, 84, 87, 90.) Her track as thus described, brought her so near the shore the she was in a slacker tide (fols, 53, 79, 62, 82, 109), or as some of the witnesses term it, an "eddy tide." (Fols. 65, 109.) Her object in keeping so near the Island was two-fold: First. She was not exposed to so strong a tide as was running farther out in the stream (fols. 52, 82, 89, 105, 107, 109, 114); and, Second, in that position she was free from the ordinary course of vessels when beating against the wind, as they would not approach this slacker tide, nor would they stand so near the sloop's track in making their tacks. (Fols. 105, 107, 108, 110.) The river there is about 740 feet wide (fol. 53,) and the course and position of the sloop left at least 650 feet of the river to other vessels.

While the sloop was in this position, and was pursuing the course described, she discovered two schooners at the upper or north-eastern end of Blackwell's Island, beating down through the same channel. (Fols. 50, 69.) Of these two schooners the head one was the Charles Hawley, and the other was the Mary Evelyn. (Fols. 31, 50, 64.) They were near together, (fols. 28, 38, 52, 81, 82, 84,) so that they tacked at about the same time, the Hawley putting her helm down first, (fol. 50), and the Mary Evelyn following around in the Hawley's wake. (Fols. 24, 25, 29, 32, 39, 50.) The Mary Evelyn gained on the Hawley, so that on the last two tacks that were made she was compelled to keep off to go under the Hawley's stern. (Fols. 25, 27, 29, 32, 38, 39, 42, 45, 50, 81, 87, 88.) Both schooners made three or four tacks after they saw the sloop, and before the collision occurred. (Fols, 24, 30, 38, 50.) The position of the Mary Evelyn with reference to the Hawley and the Ethan Allen was such, that at times the Ethan Allen was shut out from her view by the Hawley. (Fols. 27, 28, 45.) When the two schooners made their last tack to the east-

ward before the collision, the Mary Evelyn was compelled to keep off so as to go under the Hawley's stern (fols. 53, 81, 88,) and in so doing she approached within 25 feet of the Long Island shore as she went about. (Fols. 24, 31, 39, 45, 47.) When she had got about and her sails had filled away, the Hawley was just tacking again on the Blackwell's Island shore (fols. 39, 45, 54, 64, 82, 88,) and as she went about and shot ahead with the tide, she passed nearly along side of the Allen, which was then just inshore of her. (Fols. 51, 64, 82.) At this moment the Mary Evelyn was standing across the river towards Blackwell's Island, and was heading for the foremast of the Hawley, which latter vessel was standing on the other tack. (Fols. 25, 31, 34, 39, 45.) The Mary Evelyn instead of tacking and standing with the Hawley, put up her helm and kept off the wind so as to go under the Hawley's stern. (Fols. 29, 32, 34, 39, 45, 82, 88.) In doing this she was carried in shore of the track made by the Hawley, and being off the wind she was compelled to make a larger sweep in going about. (Fols. 29, 46, 47, 51, 58, 59, 62, 82.) As she passed the Hawley's stern she put down her helm to go about, and luffed directly into the Ethan Allen, striking her on her starboard bow, running her jibboom and bowsprit in between the mast and port rigging of the Allen, and sinking her in a few minutes. (Fols. 33, 44, 51, 82, 88.) No effort was made by the Mary Evelyn to avoid the collision, and the testimony of all the witnesses but those on board of her, is that she could have avoided it by going about before she passed the stern of the Hawley, and standing on the same tack with that vessel. (Fols. 52, 68, 83, 85, 89.) And it also appears that the Mary Evelyn could have avoided the collision by running off before the wind after she tacked under the Long Island shore. (Fol. 49.)

POINTS.

I.

It was negligence on the part of the Mary Evelyn to be following so close upon the Hawley in that narrow channel, and especially so as she had long seen the Ethan Allen (fols. 24, 27, 30, 38), and knew that she must be avoided.

1. The Mary Evelyn had been gaining on the Hawley, and finally was so near to her that when both vessels tacked, the Evelyn was obliged to keep off to go under the stern of the Hawley. This she had done on two tacks certainly. No effort had been made by her to shorten sail, nor had she slacked off her sheets, which would have effectually kept her in working distance of the Hawley.

James Simmons, mate of the Mary Evelyn, says (fol. 27): "We were gaining on her a little." John W. Petty, master of the Evelyn (fol. 38): "My vessel was gaining on the Hawley." John M. Andrews, of the Charles Hawley (fol. 87): "The Mary Evelyn * * gained on us fast." Horton, of the Evelyn (fol. 45): "we kept her off, so as to pass the Hawley's stern."

Simmons, mate of the Evelyn (fols. 25, 29): "We kept away a little to clear her (the Hawley) under her stern." "We were compelled to keep off the wind some on the last tack to Island, to keep clear of the Hawley. When she went about, we kept off to clear her. Suppose we must have been off two points then. That made us take a little longer to go about on that tack than if we had been close to wind." Petty, master of the Evelyn (fol. 39): "I kept my vessel off when I saw the Hawley ahead of me, broadside to my jibboom."

Andrews, of the Hawley (fol. 88): "When we tacked last on the Long Island shore, the Mary Evelyn was close to us, and kept away a little to clear our stern; after we had tacked, she came around nearly astern of us, a very little under our lee."

Charles Bennett, master of the Hawley, at fols. 81, 82: "For two tacks the Mary Evelyn had been so near to us that she went around our stern to tack when we were in stays." "The Mary Evelyn kept off to go round our stern."

2. The river there, by the chart, is but 740 feet wide (fol. 53); the two schooners together covered a width of 320 feet (they were each 160 feet long, including spars (fols. 24, 38, 53), and the fact that two vessels in proximity covered so much space should have warned a prudent navigator that in such narrow work it was dangerous. But the real working width of the river there, exclusive of the slacker tide, is but about 650 feet; so much more then should the stern vessel have avoided a too close proximity with the head one.

It will be noticed here that we have given the river at the widest statement made in the evidence. The estimates of the witnesses are as follows:

Merrill, of the Allen (fol. 53): "I make the river, *by the chart*, 740 feet wide there."

Horton, of the Evelyn (fol. 47): "I judge the river to be between 5 and 600 feet wide there."

Wiggins, of the Allen (fol. 69): "*Q.* How wide do you think the river is there? *A.* Six or seven hundred feet, I suppose."

II.

The Mary Evelyn was also guilty of negligence in changing her course by keeping off, and thus rendering a larger sweep necessary to go about.

Steam Tug "William Young," Olcott, 38.

This was a case of a steamer with a barge in tow, pro-

ceeding up the Hudson river, and meeting a sloop (Charlotte), which changed her course, and thereby caused the collision.

Held, The sloop was in fault, and libel dismissed.

1. It is no defence to this charge to say that the Mary Evelyn must keep off to clear the Hawley. She knew her position before that necessity arose. She could have avoided it by keeping further *astern* and to the leeward of the Hawley.

"It is not enough to show that the collision could not have been prevented at the moment, if it might have been by previous precautions."

1 Parsons' Shipping and Admiralty, 529.

"If a vessel charged with having occasioned a collision should be sailing at the rate of 8 or 9 miles an hour, when she ought to have proceeded at the speed only of 3 or 4, it will be no valid excuse for the master to answer that he could not prevent the accident at the moment it occurred, if he could have used measures of precaution that would have rendered the accident less probable. It may undoubtedly be important that a voyage should be completed in the most speedy manner, but such speed must be combined with safety to other vessels sailing in an opposite direction."

In the case of the Virgil, 7 Jur. 1174; 2 W. Rob. 201, 205, per Dr. Lushington.

"In the harbor of New York, crowded as it is with craft of all descriptions, so that but a limited space is allowed for the management of large vessels, and where baffling eddies and tides are to be encountered, it is more necessary than on broader pathways, for vessels of every class to forego special privileges, and

render in their own movements relief to the navigation of others with which there is danger of being brought into conflict, particularly if apprised what is to be done to that end."

The Cornelius Vanderbilt, 1 Abb. Admiralty, 361. (Opinion of Judge Betts, 365.)

So, in this case, it is no excuse for the Mary Evelyn to assert, that, being where she was, she was compelled to keep off in order to go around the Hawley's stern, for she should not have been in that position at all in that narrow work.

2. The fact that the Ethan Allen had the wind free, did not relieve the Mary Evelyn from the obligation to take all reasonable precautions to protect herself.

"A sailing vessel is bound, when navigating in proximity to a steamboat, to take all reasonable precautions to protect herself, and avoid injury to a steamboat, and she is not entitled to impose upon the steamboat the duty to guarantee her against a collision."

The New Champion, 1 Abb. Adm. 302, head note.

The Cornelius Vanderbilt, 1 Abb. Adm. 361 and 364.

"The owners of steamboats are not to be made insurers against the negligence, ignorance or misconduct of persons in charge of sailing vessels. If a collision occurs through the inattention, want of skill or blamable conduct of the latter, which the steamer in the use of reasonable endeavors could not avoid, the consequences must fall upon the vessel in the wrong the same as if both vessels were of the same description."

The Steamboat New Jersey, Olcott, 419, 420.

3. It is clear that if the Mary Evelyn had kept her course on the wind, she would have been far astern of the Allen, when she reached her tacking place across the river.

(*a.*) When the Mary Evelyn was pointing for the foremast of the Hawley, the Hawley was abeam of the Allen (fols. 50, 82), and had the Evelyn stood on with the tide cutting her to windward 5 to 6 knots, and the Allen overcoming the force of the tide by two or three knots (fols. 29, 33, 37, 44, 50, 55, 81, 82, 90), she would have reached her point of tacking sometime after the Allen had passed it.

We repeat, it is no defence to this for the Mary Evelyn to say she would have run into the Hawley if she had stood on, for, knowing where the Allen was, and being able to determine definitely her course, it was the duty of the Mary Evelyn not to place herself in such a position as that she could not control her movements with safety to other vessels.

III.

The Mary Evelyn was aware of her negligence when she drew her answer. That answer is a tissue of excuses, based on a misrepresentation of the facts.

1. The Allen was not in the middle of the river when the collision occurred (as at fol. 20).

Simmons, the mate of the Evelyn, says (fol. 30): "We were about 125 feet from the island, when we struck the sloop."

Petty, master of the Evelyn (fol. 40): "I judge my bow was about 100 feet from the shore at the blow."

Horton, of the Evelyn (fol. 46): "The collision took place *within* 100 feet from shore, I should say."

Merrill (fol. 52): "At the blow, I was about 75 feet from Blackwell's Island."

Brennan, of Blackwell's Island, and who was "about 25 feet from Blackwell's Island, and about 50 feet from where the collision occurred" (fol. 56), says (fol. 59): "At the time of the collision, she (the Mary Evelyn) ran right straight in, say about 75 feet from the island; she must have run that to have run into the sloop."

Henderson (fol. 73): "I should judge about 60 to 75 feet."

Bennett (fol. 84): "It was 75 feet from the point of collision to the Blackwell's Island shore."

Andrews (fol. 88): "At that time (the collision), I should say the sloop was not over 75 feet from the Blackwell's Island shore, at the outside."

2. There were no sudden and confused orders on board of the Allen, nor keeping off and then immediately luffing (as in Ans. fol. 21).

Merrill (fols. 52, 53): "I did not leave my helm; I did not luff at any time, nor did my vessel yaw." * * * "I did not keep away, because it would have exposed me more to the bow of the Evelyn." "I didn't change my course at any time after I saw these vessels. I made an effort to avoid them by keeping close to land; I did nothing to avoid them but keep my course."

Wiggins, who was so near the captain of the Allen, who was at the helm, that he could touch him, and was well able to judge, says (fol. 67): "She went as straight as she could go on her course, keeping her course right along."

"*Q.* Did she luff?

"*A.* No, sir.

"*Q.* Are you positive of that?

"*A.* Yes, sir."

Bennett (fol. 83): "The Ethan Allen did not change her course clear down to the time of the collision."

No proof was offered by the Mary Evelyn, on the trial, to show confused orders, or any orders on board the Allen.

3. The Allen was close under the Blackwell's Island shore—certainly within 75 feet of it; and not in the middle of the channel, or 370 feet from the shore, as charged by the Evelyn's answer.

Can it be possible that this mistake was honestly made?

4. She was not where she could luff or keep off.

Merrill (fol. 55): "When I saw the vessel tack at Long Island shore, I was not in a position to luff off to Long Island shore."

"*Q.* Why not?

"*A.* After the vessels had drawn across the river towards me, I could not luff off; there was not room enough. They were driving down river. I was 500 or 600 feet below them when they tacked; I was going about five knots, and the Hawley at the same speed."

Wiggins (fol. 67): "*Q.* Could you have done anything, and if so, what, to have avoided the collision with the Mary Evelyn, after she came around under the stern of the Hawley?

"*A.* I could not have done anything then, not to keep clear of her.

"*Q.* If you had kept off, what would have been the effect?

"*A.* She would have struck us in a worse place—amidships.

"*Q.* Suppose you had luffed?

"*A.* She would have come into her anyway, then."

Bennett (fols. 83, 84): "*Q.* Could the Ethan Allen have done anything then to avoid the collision?

"*A.* I don't think she could in the position the vessels were in.

"*Q.* Suppose the Ethan Allen had luffed, what would have been the effect?

"*A.* The Mary Evelyn would have hit her, because she

was in the act of turning, which kept the sloop from luffing.

"*Q.* Suppose the sloop had kept away?

"*A.* It would have made it worse, because the sloop would expose its broadside, and they would be coming together. The Mary Evelyn wanted all the room there was there to turn around in.

"*Q.* If the Allen had kept off at the time the Mary Evelyn commenced her tack, would the collision have been avoided?

"*A.* No, sir; she was within 75 feet of the island, and could not have gone through that.

"*Q.* Suppose she had taken the other *cause?*

"*A.* *Then we should have hit her on the other tack.* I mean on our other tack."

Andrews (fols. 89, 90): "*Q.* Was there room enough for the Allen to have gone a few feet nearer Blackwell's Island, and thus to have avoided the collision? *A.* I should not think there was. She was running about as nigh the land as was safe. *Q.* About what change of the Ethan Allen would have avoided the collision at that time? *A.* I couldn't see any that would have under the circumstances."

IV.

The defences and excuses for the Mary Evelyn urged at the trial demonstrated that her object was evasion, rather than a direct presentation of the facts and a reliance on them.

1. It was not unusual to navigate that channel against the tide, as was sought to be shown at the trial; and the Mary Evelyn, when she drew her answer, did not suppose it was. (Fol. 108.)

2. The Allen did not change her course by luffing, and thus cause the collision; and the Mary Evelyn did not so charge, but the contrary till the trial; and then the evidence forced her to abandon it, and call it an inevitable yawing.

V.

The Mary Evelyn, having determined to change her course by keeping off instead of tacking when the Hawley did, assumed the responsibility of avoiding a collision, and it became her duty to see that none could take place; and this she could have done, by running off before the wind.

1. Simmons, her mate (fol. 49), says: "We could, by turning at once from the Long Island shore, have gone up the river."

VI.

The Ethan Allen was in the usual and proper place for vessels in such circumstances to be; and any other position would have been an unusual, not to say improper one, for her; *then* to have changed her position would have been improper.

Bennett, master of the Hawley, "followed the water 24 years, and for 20 years have been familiar with the navigation of the East river" (fol. 85), says (fol. 82): "*Q.* What is the usual and proper course and position for vessels to take when going east, with a fair wind, against a strong ebb tide? *A.* It is their place to keep out of the strong tide as much as possible; to do that she would go under the shore, where the tide is not so strong."

Merrill, followed the water some 33 years, and master of a vessel 17 years, running through Long Island Sound

most of the time, and through Hell Gate, says (fol. 105): "*Q.* In case of a vessel stemming the tide through Hell Gate, with a fair wind, what position should she take and keep? *A.* She should take one side of the passage, in order to avail herself of the eddy tide, and in order to keep out of the way of vessels beating down in the true tide. *Q.* Is there a usage or custom with coasters upon that subject? *A.* Yes, sir. *Q.* Have you stated the usage and custom? *A.* Yes, sir."

Wm. H. Freeman, sea-faring man, 30 years acquainted with the navigation of Hell Gate (fols. 107, 108): 1. "*Q.* Is there a usage when going through Hell Gate, stemming the tide, with a fair wind, as to what position a vessel shall take and keep? *A.* Yes, sir; we consider it so. 2. *Q.* What is the usage? *A.* If we are going up with a fair wind, we generally go as close to one side or the other as possible, so as to keep out of the tide and give vessels beating down a chance in the river. 3. *Q.* In the case of a vessel going east through Hell Gate, in the eastern channel, with a fair wind, stemming a strong ebb tide, and discovering two schooners at a distance beating down, the first-named vessel at the time being close under Blackwell's Island, what is it her duty to do with reference to the two schooners which she sees beating down? *A.* I should take a course and keep it. The vessel stemming the tide should take one shore or the other, and hold it." 4. *Q.* In the case supposed in Question 3, what position should the vessel with a fair wind take and keep? *A.* I think she should keep close under the island, so as to give vessels a chance in the river." Henry S. Rackett, sea-faring man about 35 years, and master of a vessel about 30, acquainted with the navigation of Hell Gate (fols. 109, 110): 1. "*Q.* When a vessel is going through Hell Gate, stemming the tide, with a fair wind, is there a usage as to what position she shall take and keep? *A.* There is. 2. *Q.* What is that usage? *A.* To keep along in the eddy, or slack water. 3. *Q.* What should be her position with reference to the shore? *A.* Inasmuch as the eddy, or slack water, is close in by the shore,

the position of the vessel should be as near the shore as possible. 4. *Q.* In the case of a vessel going east through Hell Gate, in the eastern channel, with a fair wind, stemming a strong ebb tide, and discovering two schooners at a distance beating down, the first-named vessel at the time being close under Blackwell's Island, what is her duty to do with reference to the two schooners which she sees beating down? *A.* To retain her position under the island, if she has the island close aboard. 5. *Q.* Why should she retain this position? *A.* I should conceive the probabilities of collision more imminent by altering her position. 6. *Q.* Would it not be proper, under such circumstances, for the first-named vessel to luff when seeing other vessels tacking on the Long Island shore? *A.* I think not, if she has the island close aboard; she could possibly luff, seeing them tack on the opposite shore, *but it would have been imprudent for her to do so*, because the stream is very narrow there."

The rule of keeping in eddies and giving the larger portion of the stream to vessels going with the tide is recognized in

The Johnson, 9 Wallace, 146 and 155.

VII.

The Mary Evelyn was guilty of negligence in not going about when the Hawley did. Had she done so, the collision would not have occurred.

Merrill (fol. 52) says, "The Evelyn should have put her wheel down when the Hawley did, and come in stays; she had room to do so; there was nothing to prevent it." Wiggins (fol. 68), "She should have went about when the Hawley did, if she could. *Q.* Was there room for her to do it? *A.* Yes, sir." * * * * "There was plenty of river there outside of her, for any vessel to work." Bennett, master of the Hawley (fols. 83, 85), "*Q.* Under the circumstances, what should the Mary Evelyn have done?

A. She ought to have gone about when I went about; in that case there would not have been any collision." "*Q.* Was there any other course the Mary Evelyn could have taken than to attempt passing around your stern and tacking, as she did? *A. She should have tacked when the Hawley did.*" Andrews (fol. 88, 89), "Before that, could the Mary Evelyn have done anything to avoid the collision? *A.* I think she could. *Q.* What could she have done? *A.* Gone about when the Charles Hawley did. *Q.* Was there anything to prevent her going about when the Hawley did? *A.* No, sir; I dont think there was—nothing that I could see."

VIII.

The evidence given by the Mary Evelyn as to the Allen's distance from Blackwell's Island, and as to her luffing, &c., is not to overcome the testimony of those on board of the Allen. As to those points, it is the best and controlling evidence.

"Witnesses upon a vessel in motion, looking at another also in motion, cannot determine by the eye, unaided otherwise with reliable exactness, either her course, distance, or speed."

The Steamboat Narragansett, Olcott, 246, per Betts, J.

"Testimony of men on board their own vessel respecting their own acts, receives greater credit than testimony of men on the other vessel."

1 Parsons' Ship and Adm'r., 538.

IX.

The Ethan Allen was not negligent in not hauling out of her course and sheering to the other side of the river.

And this is the sole ground on which the courts below decided against her.

1. The schooners stood close under the Long Island shore on their eastern tacks, as the Allen knew and could see. (Fol. 53.) The Mary Evelyn went within 25 feet of that shore on her last tack in that direction. (Fols. 24, 34, 47.) And while she was thus close to that shore, the Hawley was stretching across the river towards the track of the Allen. (Fols. 24, 31, 45, 54.) Now, how can it be said that this was the time for the Allen to abandon a position close under Blackwell's Island to hazard the experiment of reaching the other shore without a collision with one or other of the schooners? Had she done this and a collision occurred, undoubtedly she would have been liable. Between one schooner and the shore, there was a path only 25 feet wide open to her. Between the two schooners it would have been madness for to have attempted to go. And yet that was exactly the position of all the vessels when she must have luffed across the channel, if she luffed at all. Afterwards she could not have luffed, for that would have brought her into the Hawley. Bennett, master of the Hawley (fol. 84), "*Q.* Suppose she had taken the other *cause* (*i. e.*, luffed)? *A. Then we should have hit her on the other tack*—I mean on our other tack."

She was entrapped so that she had no escape but to go ahead, trusting to both vessels to go about when their tacks were beaten out, and that neither of them would change their course, by keeping off.

> "They (steamers) are entitled to claim the co-operation of other vessels when hazzard of collision occurs, to take measures on their part to prevent it; and the vessel which shall refuse to yield such aid when conscious of its necessity, and hold doggedly to a supposed right, to throw the whole risk upon the steamer, must, in case of accident and injury so caused to her, expect but slender sympathy in her

appeal to the equity of courts of justice for recompense."

The Cornelius Vanderbilt, 1 Abb. Adm. 361–365.

"The rules applicable to sailing vessels are, of course, liable to exceptions and modifications. Thus, if the vessel which is bound to give way or to take a particular direction, cannot do so with safety by reason of the proximity of the shore or of other obstructions, the rule does not apply."

Allen v. Mackey, 1 Sprague, 219, 221.

The Mary Evelyn did not expect the Ethan Allen to haul across the river, but to continue her course. Petty, the master of the Mary Evelyn, at fol. 40, says, when he tacked on the Long Island shore, "I didn't then think there would be any collision. I most assuredly supposed that the sloop would go to the Blackwell's Island side. There was plenty of room for her to go to the Blackwell's Island side."

His charge against the Allen is not that she did not luff across the river, but that she varied her course unexpectedly to him (fol. 40), but in fact such variation of course was not made.

X.

The decree should be reversed, and there should be a decree for the libellants, with an order of reference for the assessment of damages.

RICHARD H. HUNTLEY,
Counsel for the Libellants and Appellants,
H. B. MERRILL and others.

U. S. Supreme Court.

HENRY B. MERRILL *et al.*,
Libellants & Appellants,

vs.

The Schooner "MARY EVELINE"
and JOHN W. PETTY *et al.*,
Claimants & Appellees.

Points for Appellees.

This case arises out of a collision between the sloop *Ethan Allen*, libellants' vessel, and the above-named schooner *Mary Eveline*, in the channel, to the eastward of Blackwell's Island, at the entrance to Long Island sound. The case is reported in 3 Benedict, 438.

FACTS.

Time; afternoon, September 20th, 1868; tide ebb, weather fair, wind from about the southwest and blowing very nearly up the channel (fol. 50); a good strong sailing breeze (fol. 3).

The *Ethan Allen* was sailing up the channel and before the wind (fol. 3) at the rate of about five knots (fol. 35), three knots an hour by the land (fol. 90), and straight along at about seventy-five, feet off the easterly shore of Blackwell's Island (fol. 82), her mainsheet off full length, boom to port (fol. 90).

The *Mary Eveline* was beating, with a reef in her mainsail, down the channel (fol. 37) in the opposite direction, and tacking between the Long Island and Blackwell's Island shore (fol. 39). The *Ethan Allen* maintained her course, and did nothing to avoid the *Mary Eveline* (fol. 53). The vessels came together as the *Mary Eveline* was in the act of going about on her tack on the Blackwell's Island shore (fols. 39, 40).

The libel alleges general negligence (fol. 4), but incidentally, in its statement of facts, (fol. 4) sets forth that the *Mary Eveline* continued standing on her tack so as to prevent the *Ethan Allen* from luffing, or in any other way avoiding her; which is the only specific charge made. Answer, general issue, and charging that the *Ethan Allen* should have kept out of the way (fols. 19, 20).

Decree for claimants, dismissing libel in the District Court; affirmed at Circuit, and appeal taken therefrom, by the libellants, to this Court.

POINTS.

I.

The *Mary Eveline* not only had the right to, but it was her duty, to keep her course and beat out her tack. The *Ethan Allen* should have kept out of the way.

Act 1864, 13 U. S. States at Large, 58; Navigation Rules, 12, 18; "Empire State, 1 Benedict, 57; Parson's on Ship, vol. 1, p. 578; "Argus" Olcott, 304; "Blossom," Id. 188; "Rebecca" Blatch and H., 347; Allen *vs.* Macky, Sprague, 219.

II.

The burden is on the libellant to show some good reason for not complying with the well established rules of navigation.

Parsons on Ship, vol. 1, page 595.

This the libellant concedes, and attempts to do, (see libel. fol. 4.) "*The 'Mary Eveline,' continued * * * * standing * * * * (on her tack) and in such a position and direction as to prevent the 'Ethan Allen' luffing, or in any other way avoiding her.*"

This the Courts below have found, is not established by the evidence. (See opinion.) It is very clear, the finding is correct.

(a.) The libel. (fol. 4), admits the foremost schooner (*Hawley*) "*beat out her tack, and went about just abreast of said sloop "Ethan Allen" and at a safe and suitable distance from her.*" The evidence is

that the combined rate of sailing of the two vessels was ten knots an hour, (fol. 55.) The *Mary Eveline* must have gone about therefore, at the same instant, as the *Ethan Allen* could have been but an instant, at that rate of speed, in passing both vessels.

(b.) This is fully confirmed by the evidence. The *Mary Eveline* ran no nearer the Blackwell's Island shore than the *Hawley* did, (fol. 25, 29, 32, 39,) and the *Hawley* "*beat out her tack and went about at a suitable distance*," (libel. fol. 3).

(c.) It is not contended but that the regular tack of the *Mary Eveline* would have carried her within, at least, seventy-five feet of the Blackwell's Island shore (fol. 32).

(d.) The *Mary Eveline* was obliged to avoid the *Hawley*, (Navigation Rule 17,) and the order "'*Hard-a-lee*' *was given as her fore shrouds cleared the Hawley's boom, and her foresheet was at once let go*" (fol. 25, 39).

(e.) Whether the *Mary Eveline* could, or not, have tacked inside the *Hawley*, is not raised by the pleadings. The evidence is, she could not (fol. 32, 39, 45, 126) It was her duty to keep her course. The *Mary Eveline* had the right to rely to the last moment on the ability and care of the *Ethan Allen* to avoid her, The Argus, Olcott, 304.

III.

The *Ethan Allen* could have avoided the *Mary Eveline.*

(1.) She could have kept away and ran nearer the Blackwell's Island shore—ten feet would have saved the collission (fols. 40, 120, 124, 126).

(2.) She could have luffed when the other vessels tacked on Long Island shore. There is evidence that such course was practicable (fols. 27, 32, 36, 38, 39, 44, 110, 115, 118). There is no evidence tending to show such a course to have been impracticable. (See Opinion.) The argument that the *Ethan Allen* could not leave the alleged eddy current and stem the tide, avails nothing. In the face of a peril clearly to be foreseen, she set out with a power inadequate to cope with opposing forces, and is therefore liable for the consequences (Helen R. Cooper, 2 Benedict 69).

(3.) If that could not be done—the Court below (see Petty *vs.* Merill, 3 Benedict 441, opin.) found it could—she should and could have luffed across the river, when the schooners first came in sight, the vessels were apart then the distance of half the length of Blackwell's Island (fol. 50). She could have hauled on the wind and beat down the channel (fol. 125.)

(4.) But if she could not have avoided the *Mary Eveline* in this way, then she should not have taken this narrow channel, knowing she must meet the customary large fleet of vessels, (close-hauled), bound West, taking advantage of the ebb tide, when she was bound to keep out of their way. It

is in evidence that she should, according to the custom, have anchored for this reason, and not have entered the channel (fol. 70, 74, 125, 126). As the Court below holds *he entirely fails to justify being where he was*, (See opinion). It is no justification that he took the alledged eddy (fol. 3) along Blackwell's Island. He had the abstract right to adopt a course convenient to himself, but not at the expense of parties who by law had the privilege of the right of way, and on whom rested the reciprocal duty of maintaining such right of way.

(5.) Nor is it enough to show that the collision could not have been prevented at the moment, if it might have been by previous precautions. (Parsons on Ship, vol. 1, p. 529, and numerous cases cited; the Clement, 2 Curt, C. C., 363.)

(6.) No custom is proven that the libellant had the right to the eddy current, but if it were, custom cannot countervail positive Statute Law.

IV.

To warrant a reversal it must be clear the courts below have committed error.

Grace Gridler, 7 Wal. 204 and cases cited.

The decisions of the Courts below were correct, and should be affirmed.

F. A. WILCOX
For Claimants and Appellees.

New York, March, 1873.